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Please note that the views expressed in this journal are those of the authors and do not necessarily reflect those of the Editors nor of the UKLSA; we are therefore unable to accept responsibility for the consequences of any errors contained within the submissions, however every effort has been made to ensure their accuracy.
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Foreword

When I agreed to become the Patron of the UK Law Students' Association I was impressed by the aspirations of its members. I had little conception, however, of how much the Association was likely to achieve in practice, for the challenges to the running of an association with a wide and constantly changing membership are considerable. Those aspirations included the publication of an academic journal, independent of any single law school, that would contain the best of what UK based law students have to offer. This was ambitious. Would the prospect of this projected Review encourage enough contributions from busy students of a sufficiently high calibre to achieve its aims? And if it did, could an editorial board be found of sufficient quality to achieve a publication that would challenge those that already exist for a wide readership?

Well, out of the blue I found on my desk a proof copy of this, the first edition, together with a letter inviting me to write the Foreword. Seventy-eight students submitted articles for consideration by the editorial board, a board whose membership had been the subject of keen competition. It is clear that the board’s challenge was embarrass de richesse. This first edition contains articles of high quality covering a wide range of topics. They are not lightweight, invite careful reading and have a range of interest that ensures that they will receive this.

The Review is to have a wide electronic publication and is to be free. This surely is an admirable first in the field of legal publishing. The authors of the articles and the editorial board are to be congratulated. I wish this Review the success that it deserves.

The Right Hon the Lord Phillips of Worth Matravers
President of The Supreme Court
Acknowledgements

The UK Law Students’ Association (UKLSA) was founded in February 2008 with the aim of bringing all UK law students together. The Association aims to provide students with a common national platform to share and develop their ideas and enrich their university experience.

The Association would like to take this opportunity to thank some of those who have made this year a success. We would like to thank our Patron and the Honorary Board for their generous support and encouragement. We would like to thank His Honour Judge Dight and Anthony Dursi (Recruitment and Outreach Manager at the Honourable Society of the Inner Temple) for making our Equalities Event a reality. We would like to thank Lord Sumption, Robert Howe QC, Andrew Caldecott QC, Tim Ludbrook and Vaughan Jacob for judging the finals of the mooting competition and Ben Wilson (Head of Communications at The Supreme Court) for his cooperation in making it a success. We would also like to thank our Directors, Fatos Selita and Vaughan Jacob, for their constant support throughout the year.

The UK Law Student Review (UKLSR) was established with the aim of furthering the Association’s aims and it is with the greatest pleasure that I welcome the launch of UKLSA’s flagship publication. It is a student-led academic journal independent of any single law school, which aims to reflect the high standard of student-created literature through the provision of a medium to enable the incorporation of these contributions into the existing body of legal academia. The editorial board is to be congratulated for its initiative and determination in seeing it to fruition. We would like to thank the undergraduates and postgraduates students from across the UK who submitted articles for this issue of the journal – your contributions have played a key role in the qualitative development of the UKLSR.

UK Law Students’ Association
Abstract: Five years ago the Corporate Manslaughter and Corporate Homicide Act 2007 introduced a new offence of corporate manslaughter into UK criminal law in order to attempt to better hold corporate bodies accountable for deaths caused by their health and safety failings. Whilst noting that the Act undoubtedly constitutes a major conceptual advance, largely moving beyond the weaknesses of the old law, it is argued that its effectiveness is nonetheless fundamentally weakened by the range of artificial restrictions, limitations and qualifications found within its small print and accordingly is in need of further reform.

I – Introduction
Since April 6th 2008, the Corporate Manslaughter and Corporate Homicide Act 2007\(^1\) (hereafter ‘the Act’) has introduced a new offence known as corporate manslaughter\(^2\) (corporate homicide in Scotland)\(^3\) into UK criminal law. The offence is committed where an organisation to which the Act applies, causes the death of an individual to which it owes a duty of care, through a gross breach of that duty and a substantial part of that breach is the way in which its activities are run or organised by senior managers.\(^4\)

In short, this new Act constitutes the latest attempt by the UK Parliament to reform the law that determines when a corporate entity is held criminally responsible for a death in and around the workplace. Where the Act’s requirements are met, a qualifying organisation can no longer be convicted of gross negligence manslaughter but is instead subject to the new legal regime.\(^5\) On February 15th 2011 at Winchester Crown Court, Cotswold Geotechnical Holdings Ltd became the first organisation to be convicted under the Act after a falling wall on a building site operated by the defendant corporation crushed an employee, a Mr Alex Wright, to death. They were subsequently fined a sum of £385,000.\(^6\) The conviction has since been confirmed on appeal\(^7\) and the Act is now being used to prosecute Lion Steel Ltd after one of their

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\(^1\) Corporate Manslaughter and Corporate Homicide Act 2007 (Hereafter Corporate Manslaughter Act 2007).

\(^2\) Corporate Manslaughter Act 2007 s1(5)a.

\(^3\) Corporate Manslaughter Act 2007 s1(5)b.

\(^4\) Corporate Manslaughter Act 2007 s1(1).

\(^5\) Corporate Manslaughter Act 2007 s20.

\(^6\) R v Cotswold Geotechnical Holdings Ltd (Winchester Crown Court, February 15th 2011).

\(^7\) R v Cotswold Geotechnical Holdings Ltd [2011] EWCA Crim 1337.
builders, a Mr Steven Berry, died falling through a roof panel whilst working at the defendant’s building sites.\(^8\)

Notwithstanding this initial success, given that the purpose of the Act is to ensure that “companies responsible for loss of life can properly be held accountable in law”\(^9\) and to further embed a health and safety culture into workplaces in the UK, its long term outlook appears less bright. Whilst superficially the Act seems to achieve considerable success in throwing off the shackles of the pre-existing legal rules in this area and introduces a potentially wide reaching offence, the devil is, as ever, in the detail. A more subtle examination reveals an array of unsatisfactory restrictions, qualifications and artificial barriers placed upon the new offence accompanied by an overly limited sentencing policy that will likely result in it ultimately making merely “a symbolic statement about corporate responsibility, which it will struggle to fulfil in practice”.\(^10\) Further, notwithstanding that the Act goes far beyond the largely undeveloped law in civil jurisdictions, it also fails to take advantage of its much wider sister provisions in common law systems such as those in Australia, Canada, New Zealand and the US, many of which could be used to its advantage.

**II – The Position Prior to the Introduction of the New Act**

In order to understand the true nature of the Act, it is first necessary to appreciate the law that preceded it and thus why any reform was necessary at all.

Prior to the new Act, charges against corporate defendants relating to deaths in and around the workplace focused on two groups of offences; firstly, since at least 1989, the offence of gross negligence manslaughter\(^11\), known de facto as common law corporate manslaughter when involving corporate defendants, and secondly, regulatory offences under the Health and Safety Act 1974.\(^12\) Whilst largely an uncontroversial matter of legal construction,\(^13\) this position was nonetheless fundamentally unsatisfactory

**II(a) – The inadequacy of corporate gross negligence manslaughter charges**

Prior to the introduction of the Act, the principal issue when prosecuting a corporate defendant for gross negligence manslaughter was simply that it was too difficult to obtain a conviction.\(^14\)

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\(^14\) Cf \textit{R v Kite and OLL Ltd} [1996] 2 Cr App R 295.
The first and most important reason for this difficulty was the view taken by the law that only an individual could commit gross negligence manslaughter in a literal sense since in reality, there was “no such thing as the company itself, no ding an sich”. Rather, a corporate entity was entirely reliant on natural persons for real world effect. To show corporate guilt therefore, it was necessary to show that whilst an individual had committed the gross negligence manslaughter offence itself, such guilt could be identified with the corporation because it had occurred in the course of its business and the individual responsible was one of its “directing mind[s]”.

Unfortunately, the law took a restrictive approach as to how this test could be shown to be satisfied. Firstly, the view was rejected that the elements of the offence itself could be aggregated from the conduct of multiple individuals associated with the company. Rather all elements had to be proved against a single person. Secondly, despite early hope, only individuals that could be said to be “the embodiment of the company itself”, able to act “independently of instructions from the board of directors” were treated as directing minds. Whilst a precise definition is unclear, this was necessarily highly exclusive. In Redfern for example, even the European Sales Manager was not treated as a directing mind of Dunlop Ltd. Essentially this amounted to an “impenetrable defence”, particularly in regards organisations of any degree of size or complexity.

The second reason for difficulty concerned the need to show a breach of a duty of care. Again here, the law took a restrictive approach. Whilst a corporation was understood as responsible for breaches of a duty of care by its employees, its directors did not owe personal duties in regards their organisation’s compliance with the law (particularly health and safety duties) or to third parties generally, without a particular additional assumption or appointment of responsibility. Whilst a corporate organisation could therefore only commit the offence if it was committed by one of its senior managers, those same individuals in any event rarely owed the victim the required duty of care.

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16 Tesco Supermarkets v Nattrass [1972] AC 153, 190 (Lord Pearson). (Hereafter Nattrass). See also Spooner (n 11); P and O Ferries (n 11); cf R v British Steel Plc [1995] 1 WLR 1356. (Hereafter British Steel).

17 See e.g. Spooner (n 11) 16 (Bingham LJ); Attorney-General's Reference (No 2 of 1999) [2000] EWCA Crim 91, [2000] 3 All ER 182. (Hereafter AG Ref No 2).

18 See e.g. The Lady Gwendolen [1965] 2 All ER 283.

19 Spooner (n 11) 16 (Bingham LJ).

20 Nattrass (n 14) 170 (Lord Reid).

21 See e.g. Nattrass (n 14) 171 (Lord Reid), 187 (Viscount Dilhorne), 200 (Lord Diplock).


Taken together, these issues resulted in derisory conviction figures. Between 1992 and 2005, only 34 corporate gross negligence manslaughter cases were brought, with just 6 convictions.\(^{25}\) In each such case, the guilty organisation was a sole trader who was both the ground level workforce and the directing mind.\(^{26}\) In cases involving larger corporations, directing minds were usually simply “too far removed in time and space from the resulting harm”\(^{27}\) to be held responsible,\(^{28}\) even where fault was obvious.\(^{29}\)

**II(b) – The inadequacy of charges under the Health and Safety at Work Act 1974**

In respect of charges under the 1974 Act, the issue was not one of practicality but of proportion. Whilst undoubtedly a useful legal tool to deal with workplace health and safety issues since liability is vicarious,\(^{30}\) it is clearly “not enough for [cases of death] to be charged under health and safety law”\(^{31}\) alone. Ultimately, such a position fails to illustrate the gravity of both the event and the loss caused, or to provide an appropriate level of official condemnation as to the harm that had occurred,\(^{32}\) not least since offences are merely regulatory and no offence is even triable on indictment only.

**II(c) – Conclusions**

Prior to the introduction of the new Act, the law was undoubtedly ill-suited to the task of securing corporate accountability for workplace deaths. In essence, prosecuting counsel were left with an unfortunate choice between an often simple conviction but for an offence which bore no relation to the gravity of the acts committed (the 1974 Act) and an almost impossible task to obtain a conviction for an offence that did (gross negligence manslaughter). More broadly, organisations were left free to take an unsatisfactorily lax approach to the health and safety of their workers and the public without fear of an effective and appropriate legal sanction other than an often small fine for a minor offence. This was plainly unsatisfactory.

Perhaps the most graphic illustration of the failings of the old law comes from statistical evidence. Prior to the introduction of the Act, around 220 people died at work every year along with 360 members of the public.\(^{33}\) Shockingly, Slapper and Tombs estimated that around 70 – 85% of these deaths could have been avoided by


\(^{26}\) ibid.

\(^{27}\) Gobert, ‘The Corporate Manslaughter and Corporate Homicide Act 2007 - Thirteen years in the making but was it worth the wait?’ (2008) 71(3) MLR 413, 418-9. (Hereafter Was it Worth the Wait).

\(^{28}\) See e.g. Redfern (n 22); P and O Ferries (n 11).


\(^{30}\) Health and Safety Act 1974 s37(1).

\(^{31}\) HC Deb 10th October 2006, Volume 450, Column 194 (John Reid MP).


\(^{33}\) See e.g. Health and Safety Executive, ‘Health and Safety Statistics 2008/09’ (Health and Safety Executive, 2009) 8.
simple measures. Whilst the UK has one of the lowest rates of workplace deaths in the world, every death is one too many. Put simply, the law was plainly not delivering justice or protecting the health and safety of workers and members of the public in any meaningful way.

III – The Corporate Manslaughter and Corporate Homicide Act 2007
It was against this backdrop that the Corporate Manslaughter and Corporate Homicide Act 2007 was introduced to Parliament with the simple aim of enabling “more prosecutions to proceed”. Whilst never intended as a silver bullet meaning that “each [previously unsuccessful] case would now be successfully prosecuted,” the new Act falls to be judged by the extent to which it gives effect to the “general cultural shift in favour of corporate accountability” and deals with the aforementioned issues of the old law.

III(a) – An outline of the Act
At its heart, the Act makes two main legal amendments to deal with growing public concern about the previous law. Firstly, where its technical requirements are met, qualifying organisations can no longer be convicted of gross negligence manslaughter in respect of deaths that have occurred after April 6th 2008. Secondly, the Act introduces a new homicide offence, not applicable to individuals, known as corporate manslaughter (corporate homicide in Scotland). It is triable on indictment only and requires the consent of the Director of Public Prosecutions before a case is brought (except in Scotland). As noted, the offence is committed where a qualifying organisation causes the death of an individual to which it owes a duty of care, through a gross breach of that duty and a substantial part of the breach is the way in which its activities are run or organised by senior managers. All other homicide offences, e.g. unlawful act manslaughter are left unaffected, as is the application of the 1974 Act, albeit that it is now properly seen as a fall-back charge in cases of death.

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34 See e.g. Slapper and Tombs, ‘Corporate Crime’ (Longman, 1999).
35 Health and Safety Executive, ‘Workplace Injury: Comparison of Great Britain with Europe and the USA’ (Health and Safety Executive, 1997) 1.
39 See e.g. Joint Committee (n 36) 7.
40 Corporate Manslaughter Act 2007 ss20, 27(1); Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No 1) Order, SI 2008/401.
41 Corporate Manslaughter Act 2007 s18.
42 Corporate Manslaughter Act 2007 ss10(4), (5).
43 Corporate Manslaughter Act 2007 s17.
44 Corporate Manslaughter Act 2007 s1.
45 Corporate Manslaughter Act 2007 s19(2); cf Connelly v DPP [1964] AC 1254.
III(b) – Two steps forward

III(b)(i) – The nature of the change of approach

Broadly speaking, the Act is intended to follow the approach taken in other jurisdictions and rejects an offence based on transferring liability from an individual to a corporation in favour of introducing a new broader corporate-specific homicide offence based on organisational killing. Whilst the concept of “management failure” is not adopted, the Act is nonetheless broadly aimed at cases where death is caused by “the way in which [an organisation’s] activities are managed or organised” where conduct fell far below what could reasonably have been expected. The critical question for the jury therefore is “whether a better or properly run company would have prevented or avoided the death which has occurred”.

III(b)(ii) – Advantages of such an approach compared to the old law

At its widest, the conceptual shift the Act purports to represent must be advantageous. If nothing else, the introduction of a specific corporate homicide offence as opposed to the continuing application of one designed for individuals to the corporate context is itself particularly desirable when considered as part of the wider drive to produce more coherent and appropriately crafted criminal law. Of more fundamental importance however, is the legal recognition of the concept of homicide liability based on “intra-organizational bureaucratic failures” and organisational wrongdoing. This constitutes “a quantum leap in legal discourse” in that the law now appears to recognise that a corporation is more than simply a set of independent individuals, indeed it goes further even than simply accepting it can be an aggregated sum of its parts. Instead, much like in the law of trusts and contract, it is now seen as having distinct public personae that exists independently of its workforce as a “culpability bearing agent in [its] own right.”

Adopting this more realistic position brings a number of benefits. Firstly, notwithstanding that it is not stated expressly as originally proposed by the Law Commission, the Act shows a greater legal understanding that corporate failings “may be regarded as a cause of a person’s death even though the immediate cause is the act or omission of an individual.” This is so even though the concept of

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47 LC 237 (n 23) Part 8.

48 Corporate Manslaughter Act 2007 s1.

49 Ormerod and Taylor (n 10) 593.

50 See e.g. Domestic Violence Crime and Victims Act 2004 s5; Road Safety Act 2006 ss20-1.


52 Wells (n 38) 653.

53 Cf Ormerod and Taylor (n 10) 593.


55 LC 237 (n 23) 135; cf R v Kennedy (No 2) [2007] UKHL 38, [2008] 1 AC 269.

56 The Government’s Proposals (n 10) para 3.18.
corporate culture is not used expressly as in provisions in Australia;\(^{57}\) instead the Act talks of compliance with health and safety legislation and of “attitudes, policies, systems or accepted practices within the organisation”.\(^{58}\) Further, it is now understood as a given that “organisations should be under a duty to reduce the chances of those [individual] errors taking place and to minimize the consequences when they do”.\(^{59}\) Taken together, this makes a strong symbolic statement that organisations are not above the law and that workplace deaths are “real crime[s] and not just a regulatory offence”\(^{60}\) or a mere cost of progress, undoubtedly a more mature approach to this area of law.

Prima facie, the broad direction of the Act also provides a benefit in practice. In terms of establishing liability, the need for a directing mind appears to be jettisoned and since liability is framed directly against the corporate entity, it should also be much easier to show a duty of care since such duties are owed more freely by a corporation itself than by its directors. At least in theory, this should make it easier to establish a conviction against a corporate body. Further, the mere existence of the Act should lead “to greater attention being paid to the calculus of risk management decisions”\(^{61}\). This will lead to greater proactive protection of those in contact with the organisation prior to any death.

III(b)(iii) – Advantages as opposed to other possible corporate manslaughter models

The advantage of such a development is further established if one considers other possible models for a corporate manslaughter offence that exist. The simplest option involves merely widening the old directing mind requirement, thereby reducing the focus on high-level managers. To this end, a rule that a directing mind is “anyone with a sufficient degree of autonomy with regard to making corporate decisions and instigating corporate actions”\(^{62}\) could have provided at least a workable position. The lack of a role for organisational culture or even aggregation however makes this insufficient.\(^{63}\)

A second option would involve creating an offence based on vicarious liability as used extensively in this area in the United States\(^{64}\) and on occasion in New Zealand.\(^{65}\) Broadly, corporate liability would exist when an employee commits gross negligence manslaughter in the scope of his employment without any directing mind requirement at all. Although such an approach has found favour in the UK when dealing with

\(^{57}\) E.g. Criminal Code Act 1995 (Commonwealth of Australia) s12.3(2).

\(^{58}\) Corporate Manslaughter Act 2007 s8(3)a.

\(^{59}\) Wells (n 38) 654.

\(^{60}\) Was it Worth the Wait (n 27) 24.

\(^{61}\) ibid, 25.


\(^{63}\) See e.g. LC 237 (n 23) para 7.33.

\(^{64}\) See e.g. New York Central & Hudson Railroad Company v United States 212 US 481 (1909); United States v A and P Trucking Co 358 US 121 (1958).

\(^{65}\) See e.g. Linework Ltd v Department of Labour [2001] 2 NZLR 639.
certain statutory offences, the concern must be that such an approach produces overly wide liability for “acts occurring independently of the exercise of will” and thus without fault. This would include situations where management has “expressly forbidden the employees from committing the acts in question” or where it cannot possibly be expected to oversee the acts of its individual workers, which may number into the hundreds of thousands. Even allowing for the possibility of a due diligence defence this is plainly unacceptable.

A third option is an offence based on reactive fault. This would assess liability based on acts taken post death by the corporation to ensure such an incident never occurs again and whether appropriate compensation has been paid. Whilst this is welcome in that it focuses on the inter-organisational element of the issue, it fails entirely to correlate with the traditional framework of criminal law and ignores the principle of concurrence. Whilst it may be useful to consider these elements at the sentencing stage, they ought not to be seen as a useful mechanism for the attribution of liability itself.

The final option, perhaps the most radical, is to regard the identification doctrine and the vicarious liability formula as mere (albeit polar extreme) examples of how liability can be attributed to corporations. Once it is determined that the offence is one a corporation can commit, liability is attached by any appropriate means based on policy grounds. Whilst there has been no experiment along these lines in the UK, this author must express disapproval; largely as such an approach would be too out of step with current thinking.

**III(b)(iv) – Conclusions**

Overall the introduction of the new offence based on organisational killing, should be seen as a desirable development. Firstly, it makes a strong statement that the law is adapting to deal with organisations that take unreasonable gambles with the safety of others. Secondly, it appears to deal with each of the issues that caused the old law so many of its problems. Finally, it does not contain the flaws of the other suggested potential models. At least prima facie it is appears to be a highly promising solution to a difficult problem.

Perhaps the clearest evidence in support of this statement can be seen in a hypothetical.

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66 See e.g. British Steel (n 16) Birmingham & Gloucester Railway Co (1842) 3 QB 223; Director General of Fair Trading v Pioneer Concrete (UK) Ltd (1994) 3 WLR 1249.
69 LC 237 (n 23) para 7.31.
72 See also LC 237 (n 23) para 7.35.
73 Meridian (n 15) (Lord Hoffman).
74 See e.g. Simester & Sullivan (n 54) 262; AG Ref No 2 (n 1).
Barry is a multi-drop lorry driver in a large company. Whilst driving between deliveries, Barry crashes his truck into a car driven by Carla. Carla is killed instantly. Barry was speeding. This is because the organisation that he works for allows him insufficient time to complete all his deliveries whilst obeying the speed limit before his shift finishes. As on most days, Barry has missed his required breaks to keep up, a fact known to head office but ignored in order to avoid reducing the number of deliveries he can make per day and thus maximising the organisation's profit margin.75

Under the old law, proving that Barry was a directing mind of the organisation he works for would likely be impossible. Thus, no corporate gross negligence manslaughter prosecution could ever succeed.76 Under the Act however, since a duty of care is undoubtedly owed, the jury will be asked to consider whether there is a gross breach. Had the company prepared a safe system of work? Did it take active steps to ensure those measures were implemented? Would a better-managed company have prevented the death? Considered broadly, it would seem a conviction under the new Act and a new approach could be possible.77 Even if not, Barry’s employers will operate subject to the shadow of the legislation, forcing the development of a safer workplace environment in the future, undoubtedly a positive development for all.

III(c) – (At least) one step back
Whilst expressing general support for the broad conceptual development seen in the Act, it is nonetheless argued that in reality its effect will largely be merely symbolic. In short, this is because whilst the Act introduces a potentially wide-ranging offence, it also contains an unsatisfactory array of unjustifiable qualifications, artificial barriers and restrictions that limit its ambit and also an inadequate sentencing policy. Taken together, they largely deprive the new law of its practical bite, leaving it severely limited.

III(c)(i) Overemphasis on homicide
The first unsatisfactory qualification upon the Act involves the fact that it only covers cases of homicide.

As is clear from its title, the new Act only has application in cases of death. As a consequence, it entirely excludes the 140,000 cases of workplace injuries every year from its ambit78 and also ignores the broader issue of corporate criminal liability, organisational failure in the health and safety context and the question of how best to engage responsibility.79 Taken together, this will massively limit the remit of the Act.80

75 See e.g. LC 237 (n 23) para 8.31.
77 See e.g. Seaboard Offshore Ltd v Secretary of State for Transport [1994] 1 WLR 541 545E –G (Lord Keith).
79 Was it Worth the Wait (n 27) 10.
80 Cf Criminal Code Act 1995 (Commonwealth of Australia) s12.3 (1); DLgs (Legislative Decree) of June 8 2001 (Italy).
With this in mind, the issue becomes whether such a position can be justified. Given that the nature of the organisational problem and the level of culpability appear identical, the only difference being the arbitrary point of whether the victim is unfortunate enough to die, it clearly cannot. Whilst cases of death are plainly important, if the Act is really intended to provide more than a partial solution here it would be preferable for it to also cover (at least) cases of corporate grievous bodily harm, based on similar principles.

III(c)(ii) The range of potential defendants

The second unsatisfactory qualification upon the Act involves the array of organisations expressly excluded from its reach.

At present, the offence of corporate manslaughter can be committed by all corporations (except for corporations sole), departments and other bodies in Schedule 1, police forces and partnerships, trade unions or employers’ associations that are also employers. This provision is wider than the original Law Commission proposals which applied to corporations alone, but since the success of the Act depends on the range of organisations subject to it, not least given that “any organisation ... can cause risk to its workers and to members of the public” and any organisation outside the Act stays subject to the old law this is undoubtedly positive.

Conversely however, there are a number of unsatisfactory restrictions in the Act on this point that severely limit its potential effectiveness. The most important issue is the exclusion of unincorporated associations not expressly named, particularly given the scope of such a class. The stated rationale for exclusion is that such groups “do not exist as a legal person in the way that corporations do” and it would thus be inappropriate to treat such groups in the same way. This is, however, plainly artificial, not least given the express inclusion of certain unincorporated groups within the Act, such as police forces.

More realistically, exclusion is likely instead closely linked to the perceived “difficulties in drafting legislation that covers every single opportunity” and the “intractable problems as to the kinds of unincorporated body that ought and ought not to be included”. As such, some care has been taken to include partnerships and some large unincorporated bodies, seen as the main problem, but not to take a general inclusionary position. Even if this is the case however, the Act is in no better position. Firstly, the approach adopted by the Act is plainly both irrational and artificial. Of particular note in this regard are Crown bodies, a group the Home Office ironically originally wanted excluded.

81 Cf Homicide Act 1957 ss2-3.
82 Was it Worth the Wait (n 27) 423.
83 Corporate Manslaughter Act 2007 s1(2).
84 LC 237 (n 23) para 8.39.
85 Joint Committee (n 36) 17.
86 Draft Bill for Reform (n 37) para 41.
87 Joint Committee (n 36) 17.
88 LC 237 (n 23) para 8.55.
89 The Government’s Proposals (n 9) para 3.2.8.
bodies are included precisely because they “do not commonly have their own legal identity”, 90 the list of included bodies 91 is “remarkably short” 92 and seems constituted on a largely arbitrary basis, e.g. the Office for National Statistics is included but the Health and Safety Executive is not. Since “liability can arise as a result of being an employer or occupier [and] it is not [therefore] difficult to see how they might be liable for a death,” 93 it is hard to see how this position is defensible.

A second, broader issue is that such a position is plainly unnecessary given the existence of two pre-existing statutory formulations on point. Firstly, the 1974 Act uses the concept of undertakings which would allow for nearly 3.5 million organisations, every employing organisation, to fall within the Act and is already a well understood legal term.94 In the alternative, provisions in the Canadian Criminal Code exist that could extend the ambit of the offence to any organisation which “has an operational structure and holds itself out to the public as an association of persons” 95. Whilst there would undoubtedly be a danger of over criminalisation 96 and of appellate hearings on interpretation, either route would seem a superior option. Ultimately, the current restrictions upon the practical effect of the Act are instead both overly wide and entirely unjustifiable.

III(c)(iii) – The need for senior management involvement

The third artificial barrier, “arguably the most controversial provision in the Act” 97, is the requirement that “the way in which [the activities of the organisation] are managed or organised by its senior management is a substantial element in the breach” 98 causing death for liability to ensue.

Although there is much in the Act to be positive about, this provision is largely disastrous in that it continues to require cases to be based around the acts of senior management, one of the major problems of the old legislation. It is true, as has been seen, the definition of senior management focuses as much on the actual management of the companies as it does on formal positions 99 and it is suggested that failure to manage health and safety at an appropriate level is in itself unreasonable care.100 That said, as was noted by the Joint Committee when rejecting such a requirement, unless this in itself constitutes a gross breach of a duty of care, it is difficult to see how a

91 Corporate Manslaughter Act 2007 Sch 1; see also s22.
92 Joint Committee (n 36) 19.
93 Ormerod and Taylor (n 10) 595.
94 The Government’s Proposals (n 9) para 3.2.5.
95 Criminal Code 1985 (Canada) s2.
96 See e.g. Herring, ‘Criminal Law, Text, Cases and Materials’ (3rd edn, Oxford University Press, 2008) 768.
97 Matthews (n 25) 110.
98 Corporate Manslaughter Act 2007 s1(3).
99 Corporate Manslaughter Act 2007 s1(4)c.
100 E.g. Joint Committee (n 36) 37.
prosecution can succeed.\textsuperscript{101} In the absence of direct evidence of abject incompetence, it seems hard to say that delegating health and safety to e.g. an individual factory manager is unreasonable, let alone grossly so, bearing in mind his day-to-day role in such an environment.\textsuperscript{102} Sadly, research by the Health and Safety Executive suggests that delegation is indeed being used by organisations subject to the Act to attempt to escape its reach.\textsuperscript{103}

Again then, the critical question becomes whether this provision can be justified. Once more, the answer is that such a deep and profound restriction cannot. In short, the provision is meant to ensure that the Act is intended to criminalise “truly corporate failings in the management of risk rather than purely local ones”\textsuperscript{104}. This however ignores the fact that the nature if the provision runs counter to the very essence of the Act. Although the acts of senior management must be only a substantial part of the breach and those acts must themselves be considered holistically,\textsuperscript{105} the provision seems (at best indirectly) to “continue the identification doctrine’s preoccupation with individual rather than systemic fault”.\textsuperscript{106} In addition, it reinforces much of the disproportionate effect the old law had on small companies (e.g. as in \textit{Cotswold}) where delegation is impossible, ironically the only groups that could in any event be prosecuted under the old law. As such it is plainly unacceptable, even if the above position is not fully made out.

Given the above comments, it follows that this is another area in which the vast potential of the Act is limited and that such a restriction cannot be justified. As such, it is recommended the Act is amended in line with the view of the Joint Committee\textsuperscript{107} or the Law Commission\textsuperscript{108} or the provisions in Australia\textsuperscript{109} either of which would more closely align the law to the more flexible standard previously envisaged based on examining corporate culture. At the very least, the startling degree of definitional uncertainty as to the term ‘senior management’ must be dealt with.\textsuperscript{110} Indeed, it does not yet even appear certain whether this provision will be a matter for judicial direction, or simply left to the jury to determine as a matter of common sense.\textsuperscript{111} This will be a particular problem if, for example, only part of the required failure occurs at a senior level, or at a level below the top level of corporate officers but nonetheless at a level exercising considerable managerial power, e.g. a Divisional Manager.\textsuperscript{112} If this issue is not resolved, the Act will end up being largely pointless.

\begin{flushright}
\underline{\textsuperscript{101} ibid.}
\textsuperscript{102} ibid.
\textsuperscript{103} ibid, 38.
\textsuperscript{104} Draft Bill for Reform (n 37) para 14.
\textsuperscript{105} ibid 14.
\textsuperscript{106} Was it Worth the Wait? (n 27) 428.
\textsuperscript{107} Joint Committee (n 36) Chapter 6.
\textsuperscript{108} LC 237 (n 23) Parts VII-VIII.
\textsuperscript{109} See e.g. Criminal Code Act 1995 (Commonwealth of Australia) s12.
\textsuperscript{110} Corporate Manslaughter Act 2007 s1(4)c.
\textsuperscript{111} See e.g. Matthews (n 25) 113 -116.
\end{flushright}
III(c)(iv) – The need to show a duty of care

The fourth unsatisfactory limitation upon the offence is the need to show that death was caused through the breach of a duty of care (determined by the Judge by considering ordinary civil principles) owed by the defendant to the deceased.\(^{113}\)

At the most abstract, it is unclear why duty of care terminology is needed at all. Since a corporation undoubtedly ought not to kill without a good reason (e.g. in self-defence), it is unclear why this alone should not be sufficient. Requiring proof of a duty, a highly complicated issue in its own right, will lead only to “detouring on to a time-consuming and likely contentious dispute on an issue of dubious relevance”\(^{114}\) ultimately diverting the trial from its true purpose of convicting the guilty. This is particularly so since civil principles alone cannot properly reflect the distinctive status of a criminal scenario.\(^{115}\)

As to justification, it would seem the Government wanted to clarify “that the new offence does not apply in wider circumstances than the current offence of gross negligence manslaughter, to which all companies and other corporate bodies are already subject”.\(^{116}\) This is however seemingly inconsistent with its decision to introduce an entirely new offence and the fact that in any event, the new offence should improve upon the old law, not replicate its old weaknesses. For this reason, it is a deeply unpersuasive argument.

Leaving aside the issue of whether a duty of care should be required at all, it is also imperative to consider the nature of the duties that are relevant under the Act. Whilst it is the duties as occupier and employer that will undoubtedly be the basis of most convictions (e.g. Cotswold), the most important duties in the context of artificial limitations upon the scope of the Act are those arising from deaths in detention.\(^{117}\)

Given that on average a person dies in custody every four days,\(^{118}\) it is plainly important that corporate manslaughter liability can be derived from detention scenarios. If an individual is subject to the total control of a detaining body, the duty owed by that body to keep the individual safe must be both “onerous and profound”.\(^{119}\) Again however, the Act is unsatisfactorily limited since this provision has only been brought into force as of September 1\(^{st}\) 2011,\(^{120}\) a “final compromise”\(^{121}\) with the Government to allow it to pass at all. Whilst it would appear custody facilities are generally well managed,\(^{122}\) this position has for too long had value only

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\(^{113}\) Corporate Manslaughter Act 2007 s1(1)b.

\(^{114}\) Was it Worth the Wait? (n 27) 414.


\(^{116}\) Joint Committee (n 36) 31.

\(^{117}\) Corporate Manslaughter Act 2007 s2(1)d.


\(^{119}\) HL Deb 15\(^{th}\) January 2007 Volume 688 Column 187 (Lord Hunt).

\(^{120}\) See Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 3) Order 2011/1867 bringing into force s2(1)d of the Act.

\(^{121}\) Ormerod and Taylor (n 10) 600.

\(^{122}\) See e.g. Joint Committee (n 36) 58.
to those actually in charge of the detention system.\textsuperscript{123} Thankfully however, “the worst bit of the Bill”\textsuperscript{124} and a position arguably “beyond belief”\textsuperscript{125} has now been remedied at least in name.

A related issue, arguably more important, involves the extent that the included duties are nonetheless excluded where they arise from certain types of acts. These include full exemptions in regards to duties owed as a result of decisions dealing with matters of public policy;\textsuperscript{126} partial exemptions in regards things done as part of an exclusively public or statutory function,\textsuperscript{127} in response to emergencies\textsuperscript{128} and in regards child protection or probation\textsuperscript{129} and a mixture of both in respect of duties owed due to policing\textsuperscript{130} or military activities.\textsuperscript{131}

The first issue is that each of the exemptions is likely too wide. In regards exemptions linked to the fact that the activities involve the exercise of a public function, it is unclear why such a company is in any way different from a private equivalent. The Government argues that in the public context, such decisions are “subject to other forms of rigorous public accountability”\textsuperscript{132}. It is however unclear if this is true, or more importantly, why this is of any importance given that the end result is no different from a case involving a private body. If anything, the duty should be more stringent where the State itself acts in breach of duty when exercising public power.\textsuperscript{133}

The issue must in truth be tied up with the fact that often in such cases, a duty of care will not be owed where a decision involves “weighing competing public interests”\textsuperscript{134} and allocating resources, reflecting a distinction from tort law between operational and public policy matters.\textsuperscript{135} At the same time, it is clear that issues of resource allocation etc are hardly unusual in a corporate context. Such exemptions therefore appear arbitrary at best and deliberately evasive at worst, a position strengthened by the fact that in the case of things done as part of an exclusively public function, the exemption only covers certain duties, a seemingly irrational position. Whilst the need for legal restraint is perhaps stronger where exemptions are based on the need to perform acts in an emergency or military scenario, given the particular nature of these activities, they also remain overly wide given that liability would ensue only when acts taken in such scenario’s are grossly negligent, i.e. wholly unreasonable in all the circumstances.

\textsuperscript{123} ibid.
\textsuperscript{124} ibid 59.
\textsuperscript{125} ibid.
\textsuperscript{126} Corporate Manslaughter Act 2007 s3(1).
\textsuperscript{127} Corporate Manslaughter Act 2007 s3(2).
\textsuperscript{128} Corporate Manslaughter Act 2007 s6.
\textsuperscript{129} Corporate Manslaughter Act 2007 s7.
\textsuperscript{130} Corporate Manslaughter Act 2007 s5.
\textsuperscript{131} Corporate Manslaughter Act 2007 s4.
\textsuperscript{132} Draft Bill for Reform, para 38.
\textsuperscript{133} Ormerod and Taylor (n 10) 594.
\textsuperscript{134} Joint Committee (n 36) 59.
\textsuperscript{135} See e.g. Phelps v Hillingdon LBC [2001] 2 AC 619.
The final issue in regards exemptions is that the discussed approach amounts effectively to the re-introduction of crown immunity via “the back door”. At the outset, it is clear that the reversal of the original proposal to provide a separate legal regime when the defendant is an emanation of the Crown is a positive move, not least as it provides at least in theory “a level playing field between the public and private sector”. Given that the exemptions will however apply largely to Crown bodies, it would appear that to a large extent, unsatisfactory backdoor reversal has occurred, allowing the State to escape liability where a private enterprise performing effectively equivalent acts would not, undoubtedly a perverse situation. Again then, this area of law is highly restrictive and deeply unsatisfactory.

III(c)(v) – The exclusion of individual liability

The fifth unsatisfactory limitation upon the ambit of the offence is the decision to expressly exclude all individual liability from the Act albeit that linked individuals can still be prosecuted for gross negligence manslaughter in their own right.

The main concern here must be that whilst the Act rightly places an increased focus on organisational harm, it also prevents “the placing of blame where in many cases it properly belongs” since it is individuals, e.g. managers, that develop organisational policies and determine its priorities and values. There is therefore a “disturbing contradiction in the adoption of the corporate entity as an individual disciplinary subject of criminal law if this is to result in the exculpation...of [its] directors.”

In response to this, the Government argues that the possibility of a conviction either for gross negligence manslaughter or under the 1974 Act constitutes an appropriate legal solution. The concern must however be that these two legal avenues do not deal with the same issues. Where an individual is convicted of gross negligence manslaughter, he is convicted because he has unlawfully killed another. In respect of secondary liability for corporate manslaughter, it is involvement in the corporate failing that would be criminalised. These are subtly different concepts. In any event, given the need to show a duty of care, it is not a viable position. Between 1999 and 2005, just 15 directors were convicted of gross negligence manslaughter deaths, hardly satisfactory.

The second issue, related to the first, is that the current position actively prevents the creation of a health and safety culture in the workplace because there is no personal risk to directors since any sentence is limited to company assets which can in any

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136 Joint Committee (n 36) 59.
137 The Government’s Proposals (n 9) para 3.2.8.
138 Joint Committee (n 36) 53.
139 Corporate Manslaughter Act 2007 s18.
140 Corporate Manslaughter Act 2007 s20.
141 Was it Worth the Wait? (n 27) 421; see also Norrie, ‘A critique of criminal causation’ (1991) 54 MLR 685.
143 Draft Bill for Reform (n 37) 17.
144 Joint Committee (n 36) 80.
event liquidate and reappear free of responsibility. Since personal liability would undoubtedly involve a prison sentence, indeed Joint Committee proposals proposed a period of up to 14 years;\(^{145}\) it can “be expected to encourage those in positions of power to take more seriously their obligation to promote safety and a law-compliant culture”.\(^ {146}\) Whilst this may lead junior staff to refuse safety-based roles, or to charges being brought against ‘fat-cat’ directors rather than organisations,\(^ {147}\) it is hard to justify a lack of individual liability, especially when presently, complicit persons largely avoid responsibility.\(^ {148}\)

Overall it would seem that the exclusion of individual liability is unjust, heavily limiting the ability of the Act to meet either of its main goals. Given that the Government is increasingly criminalising connivance,\(^ {149}\) frequently charges under similar provisions under the 1974 Act\(^ {150}\) and indeed at one time supported such a proposal in this Act,\(^ {151}\) there is a need for reform. Whether this requires the introduction of a specialist individual offence or by simply introducing accessory liability is unclear.\(^ {152}\) At the very least, there is a need for positive criminal duties on directors to ensure their organisations comply with health and safety duties if the Act is not to stay curtailed.\(^ {153}\)

**III(c)(vi) – The need for the consent of the Director of Public Prosecutions**

The sixth unsatisfactory limitation upon the Act is that corporate manslaughter cases (except in Scotland) require consent from the DPP before they are brought. The concern must be that such a requirement is necessary only if it is envisaged it may be withheld for reasons beyond the traditional criteria applied by the Crown Prosecution Service.\(^ {154}\) If this is the case, it inevitably brings with it at least the appearance that corporate lobbyists have hijacked the process, something that will “be assumed even if it cannot be proved”.\(^ {155}\) This is, plainly unsatisfactory, albeit undoubtedly unlikely.

**III(c)(vii) – Sentencing Policy**

The final unnecessary restriction upon the Act is its overly limited and artificial sentencing policy.

\(^ {145}\) ibid 84.

\(^ {146}\) Was it Worth the Wait (n 27) 431.


\(^ {148}\) Cf under the Health and Safety Act 1974.

\(^ {149}\) E.g. Bribery Act 2010 s14; Terrorism Act 2006 s18.

\(^ {150}\) E.g. Health and Safety Act 1974 s37.

\(^ {151}\) Draft Bill for Reform (n 35) paras 3.4.7 – 3.4.12 cf LC 237, n21, para 8.58.

\(^ {152}\) See e.g. Law Commission, ‘Participating in Crime’ (Law Com No 305, 2007).


\(^ {155}\) Was it Worth the Wait (n 27) 437.
At present, following a conviction for the offence of corporate manslaughter the Act
prescribes three possible sanctions. The Court can issue a potentially unlimited
fine, make a remedial order obliging the defendant to take steps to remedy the
breach, any resulting issues and any deficiencies in its health and safety policy
and/or make a publicity order obliging the publishing of the details of the conviction
and any remedy awarded, although this provision is not yet in force. Sentencing
Council guidelines indicate that whilst there will “inevitably be a broad range of fines
because of the range of seriousness involved and the differences in the circumstances
of the defendants” “it will seldom be appropriate to fine less than £500,000”.

If the sentencing stage of a trial is purely about deterrence, the sentencing policy of
the Act is at least partially satisfactory. Undoubtedly the potential for an unlimited
fine (subject to the above guidelines) provides “a visible demonstration of the State’s
will to protect certain values and an affirmation that the community continues to
adhere to those values”. In short, as in other jurisdictions, the Act rightly gives
the Courts the power to target an organisation where it hurts, such that fines are not
simply a cost to buy workers lives and also have the potential to be much more than
for simple health and safety violations, fines which in any event are on the increase.

Simultaneously, the nuanced approach provided by the Council also seems alive to a
number of counter concerns. Firstly, it will avoid fines falling into the deterrence trap,
particularly that if they are too large the defendant organisation will simply close
down, leaving the whole process as a purely academic exercise in legal
responsibility. In addition, it will limit the extent to which open and frank
disclosure with the relevant investigative authorities is discouraged, without which,
any system would collapse. Finally, since fines are against the organisation, a more
adapted fine will limit the impact on groups such as shareholders who were not
actively involved in the failings and/or workers who were only of minor relevance. As
such, it must be commended.

156 Corporate Manslaughter Act 2007 s1(6).
157 Corporate Manslaughter Act 2007 s9.
158 Corporate Manslaughter Act 2007 s10.
159 Corporate Manslaughter Act 2007 (Commencement No 1) Order, SI 2008/401.
160 United Kingdom Sentencing Guidelines Council, “Corporate Manslaughter and Health and Safety
161 ibid.
162 Canadian Law Reform Commission, ‘Sentencing in environmental cases’ (Protection of Life Series,
1985) 1.
163 See e.g. Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Victoria) s13; Legislation Act
2001 (Australian Capital Territory) s133(1)(b); Criminal Code 1985 (Canada) s718.1.
164 See e.g. Perrone, ‘Workplace Fatalities and the Adequacy of Prosecutions’ (1995) 13(1) Law in
Context 94, 100; Braithwaite, ‘To Punish or Persuade: Enforcement of Coal Mine Safety’ (New York
Press, 1985) 3.
165 See Wells (n 39) 662.
Law Review 1477.
Conversely, the Act could also go further in this regard and place more practical constraints upon a defendant organisation. Indeed the New South Wales Law Reform Commission has proposed that a convicted organisation could be obliged to cease certain commercial activities for a particular period or in a particular geographic region, have business licences revoked or suspended business, be disqualified from certain contracts, particularly where they are with the Government or have profits frozen. Presumably, deregistration should be also added to this list. A similar position was also taken by the Joint Committee. As with a fine, each of the above concerns could be factored in.

More worrying is if the sentencing stage under the Act should contain at least a partial consideration of avoiding harm in the future and achieving change. In some respects, the Act is again highly positive. The possibility of a publicity order is undoubtedly important since evidence shows “the strongest motivator identified by research is the fear that the adverse publicity, loss of confidence and regulatory attention subsequent to a serious incident will cause curtailment of operations, imposition of additional costs, loss of corporate credibility and loss of business/interruption of operations”. As such, they succeed in “bringing home to convicted organisations the stigma of a manslaughter conviction and thus provide a significant deterrent effect, both specific and general, which may encourage rehabilitation”. Once again however, this provision has no effect until it is actually in force.

By contrast, the remedial order seems comparatively underdeveloped, simply requiring the defendant to remedy the breach, any matters flowing from it and any matters relating to its health and safety procedures which in the view of the Court are unsatisfactory. In this respect, it is clear that foreign provisions could have been used to produce a more directed provision better adapted to cause change. Of particular note is the concept of legal probation under the Canadian Criminal Code. Here, a Court may order a convicted organisation to make restitution to victims of the offence, carry out adverse publicity, implement policies and procedures to reduce the likelihood of further criminal activity, communicate those policies and procedures to employees, name a senior officer to oversee the implementation of those policies and procedures, and to report to the court on the implementation of the above. Whilst this would not be without criticism, “the notion of corporate probation is appealing in order to enforce remedial and rehabilitative change in an offending

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168 NSWLRC 102 (n 68) 116.
170 Joint Committee (n 36) 75.
172 ibid.
173 Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No 1) Order, SI 2008/401.
174 Corporate Manslaughter Act 2007 s9.
175 Criminal Code 1985 Canada s731.2; see also Sentencing Act 2002 (New Zealand) s32(1).
176 See e.g. Will the Punishment fit the Crime? (n 166) 125-9.
Without any doubt, this would place a strong incentive on corporations to ensure adequate safety regimes are in place and adhered to and deal with the need to prevent deaths occurring in the first place, rather than simply punishing where it has already done so. It would also place clear moral stigmatism upon the convicted party. Although there is concern about whether the sentencing stage of a criminal trial is the right forum to seek such change, it seems rather to be particularly appropriate given that a particular offender is subject to the order and given that any breach of the order is itself an offence for which, pleasingly there is presumably individual liability. All in all this would substantially improve the effectiveness of the Act and would be desirable.

IV – Conclusion

Having regard to all the above comments and bearing in mind the context in which it came into existence the Corporate Manslaughter and Corporate Homicide Act 2007 can sadly be best summed up as a disappointment, perhaps akin to a legislative bout of cold feet. Plainly, the rejection of the old law in favour of broad organisational liability offered the Act a chance to sit amidst a revered line of legislation, protecting workers and the public from businesses who take unreasonable gambles with their safety in pursuit of profit. To this end, it does at first glance appear to make it clear that the law does not regard such conduct as acceptable and that all corporate organisations have a duty to protect the health and safety of all those it comes into contact with.

In reality however, the way in which the Act is organised, with an array of irrational qualifications, unreasonable restrictions and artificial barriers, appears to leave it largely self-defeating, unable to fulfil the undoubted promise it showed. Far from being “the thin end of an ominous wedge” it is instead hopelessly limited and will prove largely impossible to apply in a satisfactory way. Even if the corporate offence finds a way to overcome the suggested difficulties, the lack of individual liability provides an additional layer of difficulty, as does the woefully inadequate sentencing policy.

Whatever its broad conceptual advantages, the reality is that under the Act as presently arranged, people will continue to die in and around the workplace without justice. Given the undoubtedly noble aims of the Act that is clearly a tragedy. Ultimately, if the new Government truly wishes to deal with organisational failures at a corporate level and to protect the workforce and the public, the Act requires substantial change, albeit within the organisational killing context. At present, “the growing power of corporations to control the legal environment in which they

177 Wong (n 71) 194.
178 Wells (n 38) 663.
179 Corporate Manslaughter Act 2007 ss9(5), 10(4).
182 Was it Worth the Wait (n 27) 438.
operate” means that for now at least, the law is wrongly in their favour. Put simply, this position cannot be allowed to continue.

183 Wells (n 38) 364.
LIMITATIONS ON THE WEARING OF RELIGIOUS DRESS: AN EXAMINATION OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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I – Introduction

In the case of Sahin v Turkey\(^1\) the European Court of Human Rights ("the Court") confirmed the principle that Article 9 of the European Convention on Human Rights ("the Convention") was, in democracies, essential for the protection of a pluralistic society; that is to say, a society of religious and cultural diversity.\(^2\) Drafted in the aftermath of the Second World War and the Holocaust, Article 9 sought to protect freedom of thought, conscience and religion. It was perceived that in democratic societies there should be no reason why people of different cultures and beliefs could not coexist in harmony. Europe would, at last, see an end to religious persecution and people would be free to manifest their beliefs without fear of undue interference from the state.

Article 9 reads as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Whilst the freedom to thoughts, conscience and beliefs may be absolute, the freedom to manifest one's beliefs are subject to the limitations contained in Article 9(2) of the Convention being; as prescribed by law and necessary in the interests of public safety, the protection of public order, health or morals, or the protection of the rights of others.

In applying these limitations, the Court has attracted criticisms. These criticisms have centred upon the Court’s apparent reluctance to challenge a state’s assessment of whether a measure has been necessary, leading some to argue that the Court treats limitations under Article 9 differently to other freedoms under the Convention. As a result the Court has maintained the status quo and, in so doing, has undermined the principle of pluralism which Article 9 seeks to protect.

This paper analyses the case law of the Court as it relates to the limitations on the wearing of religious dress and examines whether the Court has helped or hindered the development of a pluralistic Europe.

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\(^1\) Application No 44774/98 (2007) 44 EHRR 5, para 106.

II – The Case Law of the Court: Limitations for Religious Dress

II(a) – X v United Kingdom
In X v United Kingdom the applicant was a Sikh who was required by his religion to wear a turban. He complained that the Motor Cycle (Wearing of Helmets) Regulations 1973 violated his rights under Article 9 of the Convention because it penalised him for failing to wear a crash helmet when riding a motor cycle; to do so would require him to remove his turban. The European Commission for Human Rights (“the Commission”) had no trouble in regarding the 1973 regulations as an interference which engaged Article 9(1) of the Convention. In light of that the Commission went on to consider Article 9(2) of the Convention and concluded that the violation was a necessary safety measure for motor cyclists; the interference being justified for the protection of health. The Commission stated that there had been no violation of Article 9.

The Commission in X v United Kingdom was not confronted with any difficulty in deciding that there had been no violation of Article 9. The reduction of deaths and serious injuries resulting from motor cycle accidents was a legitimate aim of the 1973 Regulations and the requirement that motor cyclists wear helmets would seem to be a proportionate means of achieving the aim. What is important to note about this case, is that the Commission did consider there to be an interference and did then go on to consider whether the state’s response was necessary in a democratic society.

A particular hurdle for the Convention bodies in defining the limitations to Article 9 in later cases has been the constitutional commitment of certain governments to the principle of secularity. The extent to which the separation of church and state exists in Europe varies considerably as does the approach of domestic courts to balancing the principle of secularity with the freedom to manifest one’s religion.

II(b) – Karaduman v Turkey
In Karaduman v Turkey the applicant, a student at the University of Ankara, was denied a degree certificate after completing her studies. University regulations required graduates to provide a photograph which was to be attached to the certificate for identification purposes. The applicant provided the photograph in which she was wearing a headscarf. The University refused to issue a certificate until the applicant provided a photograph where she was not wearing a headscarf. The applicant argued that the headscarf was a manifestation of her belief in the Islamic religion and that the requirement to provide a photograph without it amounted to an interference under Article 9.

The Commission found no violation of Article 9 in what was, in the author’s view, an extraordinary judgment. The Commission accepted the Turkish Government’s arguments that the University had an obligation to respect the principle of secularity and that the wearing of headscarves was contrary to that principle. They further accepted that the wearing of a headscarf could put undue pressure to wear one on

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3 Application No 7992/77, Decision of 12th July 1978.
5 Application No 16278/90, Decision of 3rd May 1993.
those students that did not wish to do so. The Commission also stated that regulations prohibiting the wearing of headscarves ‘ensure that certain fundamentalist religious movements do not disturb public order in higher education...’.6

In the author’s view this judgment is extraordinary for a number of reasons. Firstly as Howard Gilbert observes7 the reasoning of the Commission in Karaduman is confusing because the Commission found that the rules requiring students to be bare-headed in the certificate photograph did not amount to an interference of Article 9 rights at all. Nevertheless, having decided that there was no interference which would engage Article 9(1), the Commission went on to consider whether the interference was justified under article 9(2). In the Author’s view Gilbert is right to point out that the Commission ought to have considered the justification under Article 9(2) after finding that there had been an interference. It will be recalled that in the case of X v United Kingdom8 the Commission found that there had been interference after requiring Sikh’s to remove their turban and wear a helmet. In the author’s view the decision in Karaduman, in respect of requiring removal of religious headgear, is inconsistent with the Commission’s decision in X v United Kingdom.

The decision in Karaduman is absurd for a number of other reasons. The Commission stated that ‘...a University degree certificate is intended to certify a student’s capacities for employment purposes, it is not a document intended for the general public. The purpose of the photograph affixed to a degree certificate is to identify the person concerned’. Having made this considered and accurate statement of fact the Commission appears to have failed to notice two important points. Firstly, if the certificate is not intended for the general public then how could it ever be a threat to the principle of secularism and how could it ever give support to fundamentalist movements or disturb public order? Secondly, if the photograph is meant for identification purposes, then one must surely ask how effective it could be in that purpose if the photograph contains an image of a person not wearing a headscarf, because university regulations forbid it, when for the rest of the time in the person’s life the person does wear a headscarf.

It is suggested that the decision in Karaduman is profoundly incorrect. As Gilbert pointed out the Commission should have found there to have been an interference and then went on to consider whether the interference was justified. Had the Commission done so they would surely have found that the wearing of a headscarf in a certificate photograph would be unlikely to offend the principle of secularism, unlikely to cause any problem for health or morals and would not at all interfere in the rights of others or give rise to any threat to public order. In short, this interference was not necessary in a democratic society. In the author’s view, the interference was not necessary because, as the document was not going to be seen by the general public, it could not have been a threat to public order or be a threat to the rights of others. In deciding that the rule against headdress did not amount to an interference, the Commission sidestepped the requirement to require evidence that the interference was necessary in

6 Application No 16278/90 (n 5) 108.
8 X v United Kingdom (n 3).
a democratic society. This failure to require concrete evidence to support the need and proportionality of an interference regrettably prevailed in subsequent cases.

**II(c) – Dahlab v Switzerland**

In *Dahlab v Switzerland*\(^9\) the applicant was a teacher in a primary school who, after converting to the Islamic faith, began wearing a headscarf to school. She was allowed to wear the garment, unhindered, for three years and in that time there were no complaints from parents or teachers. A school inspector later informed the Director General of Primary Education that the teacher wore a headscarf to school. The Director General decided that wearing the headscarf was prohibited and observed that it constituted ‘an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system’. Central to the Swiss Government’s arguments in this case were the fact that according to the constitution, state schools were required to adopt denominational neutrality and that the headscarf had a strong proselytising effect on young children. It was common ground however, that the teacher had not used her position to teach children about the Islamic faith.

In finding that there had been no violation of Article 9, the Court accepted that the headscarf was a ‘powerful religious symbol’ and that as a teacher she was a positive role model for young, impressionable children. The Court concluded that as such there was a risk that the wearing of the headscarf in school would have a proselytising effect on the children. The Court then made the rather startling observation that the wearing of an Islamic headscarf was inconsistent ‘with the message of tolerance, respect for others and, above all, equality and non discrimination that all teachers in a democratic society must convey to their pupils’.

Gallala points out that in the *Dahlab* case the Court gave to itself competence to assess the symbolic meaning of the Islamic headscarf\(^10\), it ‘imputed values to the headscarf and then decided that those values were inconsistent with the Convention’. Of particular note are the comments made by the Court regarding the headscarf being contrary to principles of gender equality. As Vakulenko\(^11\) notes, the decision in *Dahlab* suggests that all women who wear Islamic headdress do so because they are forced to by oppressive men. Vakulenko considers that women wear the headscarf by choice and that Islamic feminists may wear the headgear, not because they are oppressed, but as a symbol of defiance. The wearing of headgear is therefore not necessarily a symbol of gender inequality.

The author agrees with Gallala and Vakulenko on these points. The Court in *Dahlab*, had overstepped its own competence and in so doing has stigmatised the Islamic faith, misapplied the law and undermined the principle of pluralism. Rather than pass judgement on the merits of a religious order, the Court should simply have considered whether prohibiting the school teacher from wearing a headscarf was ‘necessary in a democratic society’.

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In considering whether the decision of the Director General was necessary the Court again, did not insist on evidence from the Swiss Government that the wearing of the headscarf would interfere with the rights and freedoms of others or evidence that there would be a risk of public disorder. In the author’s view the prohibition of the headscarf was not necessary and had the Court requested evidence then it would have had to conclude the same.

In terms of proselytism, the Court stated that the headscarf could have a proselytising effect on young children as the teacher was a role model. The teacher was not however, the only teacher in the school. There were many other teachers who did not wear headscarves. It seems ludicrous therefore to suggest that the children would see the headscarf and be naturally drawn to conclude that the state supported a particular religion. And given the ages of the children, it is suggested that they were unlikely to conclude that the headscarf was a symbol of male oppression. The Court fails to give any weight to the fact that some of the children attended school wearing headscarves as did some of the parents. It is therefore not the case that the children at the school were unfamiliar with the garment or its significance.

In respect of the threat to public order, again the Court appears to have given little credence to the fact that the applicant wore the headscarf in school for three years without comment or complaint and certainly without the threat to public order which the Swiss Government argued was a risk. The Court has avoided entirely any consideration of the situation, in similar predominantly Christian states, where the headscarf is worn by teachers. In these states, like the UK for instance, there has been no serious threat to public order as a result of the wearing of Islamic headgear by teachers. In the author’s view therefore, again, there is little evidence to support the proposition that prohibiting this teacher from wearing the headscarf was necessary.

II(d) – Leyla Sahin v Turkey

In the case of Leyla Sahin v Turkey the applicant, a practising Muslim, was a student at the University of Istanbul. Following a circular issued by the University Vice-Chancellor prohibiting the wearing of Islamic headgear, the applicant was refused admission to an examination because she was wearing an Islamic headscarf. The University subsequently refused to admit her to lectures. The applicant argued that the rule prohibiting wearing the headscarf amounted to a violation of her rights under Article 9.

Unlike the Commission’s decision in Karaduman the Court in Sahin had no problem with determining the prohibition of Islamic headgear to constitute an interference under Article 9(1). Having done so the Court went on to consider whether the prohibition was necessary in a democratic society. Unlike the earlier cases the Court put its mind to the existence of a European consensus on the issue and concluded that the principle of secularity was treated so differently between the member states, that it was impossible to acknowledge a single European approach. On that basis the Court determined that the Turkish Government be given a broad margin of appreciation. As with previous cases however, the Court considered

12 Sahin v Turkey (n 1).
13 Karaduman v Turkey (n 5).
14 ibid 109.
Limitations on the Wearing of Religious Dress

The protection of the principle of secularism to be of paramount importance. The Court noted that in Turkey the wearing of the headscarf had special significance\textsuperscript{15}, given the prevalence of fundamentalist movements; the wearing of the headscarf could pose a threat to public order and bring pressure upon those who did not wear the headscarf to do so. Astonishingly the Court also concluded, as did the court in \textit{Dahlab}, that the wearing of the Islamic headscarf was contrary to the principles of gender equality.

In his judgment, Judge Tulkens agreed with the Grand Chamber that there was an interference and that the interference was prescribed by law and pursued a legitimate aim. But as to whether the interference was necessary in a democratic society, Judge Tulkens and the majority of the Grand Chamber parted company. Firstly whilst the majority decided that there was no European consensus on the issue of state secularism, Judge Tulkens argued that there was a European consensus regarding headgear in universities. The Judge pointed out that ‘none of the member states has the ban on wearing religious symbols extended to university education, which is intended for young adults, who are less amenable to pressure’.\textsuperscript{16} The Judge therefore argued that there was a European consensus in this regard and that further, even if one accepts that the headgear has a proselytising effect, such an effect would not be as powerful with university students as perhaps it might be with young schoolchildren. Judge Tulkens then went on to examine the Court’s role in supervising the state’s actions within its margin of appreciation. In the Judge’s view the Court was under an obligation to establish that the ban on wearing the headscarf was necessary. He stated, that ‘the Court’s case law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples’.\textsuperscript{17} In the judge’s view there had been no evidence presented by the Turkish Government that the wearing of headscarves would cause disruption or disorderly conduct at the University.\textsuperscript{18} This, the judge stated, was a different approach to that used to assess whether a violation was necessary under freedom of expression. This created the absurd result that peacefully wearing a headscarf was prohibited under Article 9, whereas remarks which could incite racial hatred were protected under Article 10.

The Author agrees with Judge Tulkens. Even if one accepts that Turkey, with its sensitivity to religious fundamentalism, is a particularly special case, the Court still has a duty of supervision and should therefore have required the Turkish Government to provide ‘concrete examples’ of the threat to public order and the rights and freedoms of others. In failing to insist on such evidence the Court has adopted an entirely different approach to the assessment of whether a measure is necessary than it has for measures which violate freedom of expression under Article 10 of the Convention. It is suggested that the approach of the Court in \textit{Sahin}, as with the approach observed in previous cases, has actually undermined the principle of pluralism which Article 9 is meant to protect. Treating religious freedom differently from other rights of the Convention and by assessing the principles of Islamic headgear to be inconsistent with the Convention, the Court and Commission have

\textsuperscript{15} ibid 115.
\textsuperscript{16} ibid O-113.
\textsuperscript{17} ibid O-115.
\textsuperscript{18} ibid O-118
severely limited the rights of minority religious groups to manifest their religious beliefs.

**II(e) – Dogru v France**

Two years after *Sahin* the Court considered the case of *Dogru v France*. 19 Here the applicant was excluded from school for wearing an Islamic headscarf. As before the Court was keen to protect the state’s compliance with the principle of secularity and concluded that there was no violation of Article 9. Again the court did not require the French Government to provide evidence to support their claim that the interference was necessary on grounds of health and safety. Indeed it is noted in the judgment that when the teacher was asked how wearing a headscarf during classes would endanger a child’s safety, the teacher refused to answer the question and the Government provided no further evidence.20

In the author’s view this decision undermines the principle of pluralism. It is a decision which restricts the freedom to manifest one’s religion without adequately assessing whether that interference is necessary. The idea of a pluralist society is that it allows everyone’s religious beliefs to be respected. The inevitable consequence of the decisions of the European Court is that, in the author’s view, the state can too easily restrain the manifestation of that belief leading to criticism that the religious beliefs of some are far from respected.

**II(f) – Ahmet Arslan and Others v Turkey**

In the case of *Ahmet Arslan and Others v Turkey*21 the Court has found there to have been a violation of Article 9 rights for an interference by the state in the wearing of religious dress. The applicants belonged to a religious group known as the *Aczimendi Tarkaty*. The group were arrested by Turkish police after they toured Ankara wearing distinctive religious dress. The Court distinguished this case from the previous cases as this case involved the wearing of religious dress in a public area as opposed to a public establishment. What is important to note about this case is that the Court stated ‘there is no evidence that the applicants represented a threat for public order or that they had been involved in proselytism by exerting inappropriate pressure on passers-by during their gathering’.

The author agrees with the Court’s assessment in this case but suggests that this reasoning could, and should, have been applied to the previous cases. In *Arslan* the Court has clearly considered evidence put forward by the Turkish Government to support their view that the wearing of religious dress constituted a threat to public order. Having considered this evidence the Court found that the interference was not justified. In the previous cases the Court has failed to make this assessment of the evidence at all, choosing instead to maintain the status quo and place blind faith in the state’s assessment of what is necessary to protect the principle of secularism.

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19 Application No 27058/05 (2009) 49 EHRR 8.
20 ibid para 44.
III – Conclusion
The case-law of both the Commission and the Court have shown that they have been entirely reluctant to challenge states to provide evidence that it has been necessary to interfere in the right to manifest religious belief which is protected by Article 9 of the Convention. Article 9 is intended to protect the principle of pluralism so that Europe would be rid of religious persecution and would instead be a place which thrives on cultural and religious diversity. Clearly there will be occasions where it may be necessary to place limitations on the wearing of religious symbols and the Convention itself makes allowance for this. Thus it is appropriate to limit the wearing of religious dress where it is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. In determining whether a measure is necessary for these purposes the Court has a supervisory role and should, as Judge Tulkens stated in Sahin, require states to provide concrete examples of the need to interfere with Article 9 rights. That is how the Court assesses whether a measure is necessary for the purposes of other rights and freedoms under the Convention, so why does it not adopt the same approach for the purposes of Article 9? Those religions which do not require their followers to wear obvious symbols of religious belief are safe. For the great number of Christians which constitute the majority in Europe the decisions of the Court cause little concern. But for Muslim’s, Hindu’s, Sikh’s and for those other religions for which the wearing of religious garments is a manifestation of their belief, the Court’s approach will cause concern. In the author’s view the Court’s approach to Article 9 has actually undermined the principle of pluralism which, like secularism, is an important democratic principle for which state interference should only be necessary in the most exceptional circumstances; when evidence shows that it is necessary.
A CONSIDERED SILENCE
Matthew Bolt, Kaplan Law School*

Dedicated to those who did not come home and so could not write. Lest we forget.

Abstract: In 1991, in ‘its finest hour of geopolitical warfare’, the SAS slowed the rain of Scud missiles Iraq was firing at Israel, saving the Arab-Western Coalition from destruction. One of the patrols deployed, named Bravo Two Zero, was compromised during the mission; three of the soldiers died, four were captured and one got away. Of the five who survived, three have written accounts of the patrol. These accounts caused significant controversy and led to the United Kingdom Ministry of Defence (MoD) imposing a confidentiality contract on all serving members of the United Kingdom Special Forces (UKSF). The contracts purported to offer a ‘continued’ posting in UKSF in exchange for not attempting to publish any unauthorised material relating to their service with UKSF. A survivor of Bravo Two Zero, ‘Mark,’ who intended to publish his memoirs under the pseudonym ‘Mike Coburn’, challenged the contract in the New Zealand courts up to the Privy Council which upheld the contract but refused to grant an injunction against publication. This article seeks to demonstrate that the New Zealand Court of Appeal and the Privy Council erred in law by upholding the contract. Firstly, due to the fact that soldiers serve according to the Royal Prerogative, the contract cannot bind the army and renders the consideration under the contract illusory. Secondly, Coburn was subjected to legal and moral duress in order to obtain his signature. Legal duress took the form of economic duress due to the loss of the higher pay available to members of UKSF. Moral duress resulted from the particular circumstances of Coburn’s service which placed greater pressure on him than usual to sign the contract. Thirdly, the contract placed significant restrictions on Coburn’s right to freedom of expression, which requires significant justification. The alleged threat of the publication to national security does not justify such restriction. Even though the European Court of Human Rights accords broad discretion to national governments in restricting individual rights to freedom of expression, Coburn would have been able to publish had he sought justice under the European Convention on Human Rights. However, due to the European Court of Human Right’s willingness to allow sanctions to be imposed, Coburn would still have had to account for the profits of the publication had he pursued this option, which would have left him in the same position. In order to ‘gag’ Coburn, the MoD relied on equitable remedies necessitating that it come with ‘clean hands’. However, the evidence available suggests that the MoD’s repeatedly interfered with the defence and trial process, such that it did not come with ‘clean hands’, a fact unacknowledged by the New Zealand appellate courts yet vital to determining the correct outcome of the case.

Author’s Note on Sources
It is in the nature of secret operations that sources are limited and occasionally of doubtful provenance. Additionally, the only academic consideration of the works of SAS memoirists from the first Gulf War was conducted by the same author. This

* With thanks to Warren Templeton, Barrister, for his unstinting generosity of both his time and personal papers.
presents some unavoidable issues due to a lack of peer reviewed sources available for this work. Furthermore, the events surrounding the publication of *Soldier Five* by Mark Coburn have been subject to controversy and affected persons who either were at the time or currently hold senior positions in either the United Kingdom or New Zealand. Naturally, they are unwilling to make their opinions public without anonymity and as a result it has been impossible to substantiate certain allegations made in this text in the usual academic manner. Whilst unsubstantiated in the traditional manner, the allegations of impropriety levelled against the Ministry of Defence and the critiques of the appellate courts have been based on both conventional sources and confidential reports. Hopefully this enforced lack of full disclosure will not affect the overall argument.

I – Introduction

The British public has always been interested in secret affairs, the embodiment of this 22nd Special Air Service (SAS) Regiment’s famous storming of the Iranian Embassy in London in 1980. A fascination was stirred by BBC 1’s Panorama report on Bravo Two Zero, an SAS patrol during Operation Granby, the British deployment to the Gulf in 1991. This resulted from a court case in New Zealand where one member of that patrol, Mark Coburn, challenged a confidentiality contract preventing him from publishing his memoirs. Such memoirs are hardly scarce commodities; Amazon lists 39,704 items under ‘SAS’. Why did this memoir and contract cause such controversy?

The controversy partly lay with the memoirist’s new, more abrasive tone. However, the legal contentions were wide ranging. The UK Ministry of Defence’s (MoD) response was to try and stifle further publications by requiring all members of the United Kingdom Special Forces (UKSF) to sign a confidentiality contract. The contract forbade unauthorised publications and granted royalties to the MoD. Failure to sign led to instant dismissal.

Firstly, the validity of the consideration offered under the confidentiality contract and the potential clash with Royal Prerogative will form the basis of the initial analysis in this article. Secondly, Coburn’s allegations that he signed under duress will be examined. The carefully limited doctrine of duress was the subject of disagreement between New Zealand’s High Court and appellate courts, thus warranting particular consideration encompassing both legal and moral duress. It is noted that the nature of

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3 *R v Her Majesty’s Attorney-General for England and Wales* (New Zealand) [2002] UKPC 22.
4 Amazon UK <http://www.amazon.co.uk/gp/search/ref=sr_nr_i_0?rh=k%3ASAS%2Ci%3Astripbooks&keywords=SAS&ie=UTF8&qid=1294401863> accessed 6 December 2010.
5 It should be noted that UKSF at this point included 21,22 & 23 Special Air Service Regiment and Special Boat Service plus support units.
6 *R v Her Majesty’s Attorney-General for England and Wales* (New Zealand) [2002] UKPC 22 [9].
military service will be a repeated feature of this article with the aim of reconciling the military and the law. Fourthly, any limitation of basic freedoms such as the signatory’s freedom of expression requires a greater than normal need on behalf of the state. This justification and the methods of redress open to Coburn will be examined. Finally, the question of why a contract was chosen by the MoD over the Official Secrets Act will be addressed.

All these questions of contract, duress, freedom of expression and contract versus statute resulted from the seismic shift in the nature of military memoirs which resulted from increased demand after 1992. Military memoirs had been in existence since at least 401BC, written almost exclusively by officers, the tone was deferential and neutral. The dead were spoken well of, superiors praised and the realities of war shirked. Importantly blame was not assigned. However, after 1992, the nature of military memoirs changed as gritty texts by ‘other ranks’ blamed, exaggerated and defamed. At the forefront was Bravo Two Zero. Abandoning their legendary ‘omertá,’ General Sir Peter de la Billière, Sergeant ‘Andy McNab’ and Corporal ‘Chris Ryan’ all published memoirs between 1992 and 1995. While de la Billière’s work was traditional, it had opened the floodgates to a new era. The books were bestsellers, films were commissioned and great offence caused. If interest had been lower, it is doubtful this new style would have developed or required ‘gagging orders’ to stem the flow. Without this intense interest, an extraordinary legal battle would have been prevented. What then was the mission and why was it so important? In 1990 Iraq invaded Kuwait; its battle-hardened army was poised next to the Saudi Arabian oil fields. A fragile Arab-Western Coalition, backed by the United Nations (UN), assembled to liberate Kuwait. Iraq needed to split Arab from Westerner. To this end, Iraq fired Scud missiles into neutral Israel to provoke an attack on fellow Arabs that would have shattered the Arab-Western Coalition. It was therefore imperative for the Arab-Western Coalition to stop the Scuds. Guns and planes failed; in

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9 For further information on this change see M Bolt, Blood and Ink: The changing face of military memoirs since 1945: With particular reference to Special Air Service operations during the First Gulf War (BA, University of Southampton, 2009).

10 It should be noted that ‘McNab’ and ‘Ryan’ are pseudonyms as are almost all the SAS memoirists.


12 Panorama (n 2).


A Considered Silence

desperation the SAS were deployed.\textsuperscript{16} Utilising almost its entire ‘in theatre’ force in ‘its finest hour of geopolitical warfare’, the SAS slowed the attacks keeping Israel on the side lines.\textsuperscript{17} Although successful, the operations were hardly faultless. A Squadron’s Commander had been relieved of command and none of B Squadron achieved their mission.\textsuperscript{18} Furthermore, Bravo Two Zero had suffered 88% casualties.\textsuperscript{19} In short, there was plenty to write about including who caused the deaths of three members of Bravo Two Zero.\textsuperscript{20} Prior to 1998, five books were published by ‘other ranks’: A Squadron castigated their commanders, B squadron spoke ill of the dead and both self-aggrandised to an alarming degree.\textsuperscript{21} Former soldiers were shining a light on a secret world and creating scandal. The British Army had not faced such a situation since \textit{Cardigan v Calthrope}.\textsuperscript{22} In that instance, Calthrope had written a memoir accusing Cardigan of cowardice; Cardigan sued.\textsuperscript{23} Eager to prevent a reoccurrence, the MoD introduced the confidentiality contracts, sparking even more litigation.

II – From Scuds to Subpoenas

\textit{R v Her Majesty’s Attorney-General for England and Wales} concerned ‘Mike’ Coburn, also known as ‘Mark the Kiwi’.\textsuperscript{24} Coburn had joined 22nd SAS in 1990 from the New Zealand Special Air Service (NZSAS) although officially he was seconded from the Parachute Regiment, a unit in which he had never served.\textsuperscript{25} He served until 1997, being wounded and captured during Bravo Two Zero.\textsuperscript{26} What actually happened remains a mystery as all published accounts are at significant variants. Coburn stated he wished to set the record straight.\textsuperscript{27} However, along with almost all UKSF personnel, Coburn had signed the confidentiality contract introduced in 1996.

\begin{enumerate}
  \item Geraghty (n 14) 24; M Ryan, \textit{Secret Operations of the SAS} (Barnsley, Pen & Sword, 2003) 145, 149-150; de la Billière, (n 11) 288.
  \item P Ratcliffe, \textit{Eye of the Storm} (London, O’Mara, 2001) 285, 292-293; Asher (n 16) 488; Geraghty (n 14) 44; de la Billière (n 11) 222.
  \item Ratcliffe (n 18) 274.
  \item These men were Sergeant Vincent Phillips, Trooper Robert Consiglio MM and Trooper Steven Lane MM.
  \item Asher (n 16) 239-248; Bolt (n 9).
  \item Court of the Queen’s Bench, Westminster, June 10, The Queen on the prosecution of the Earl of Cardigan V. The Hon. Colonel Calthrope, \textit{The Times}, June 11 1863, page 12.
  \item M Adkin, \textit{The Charge: The Real Reason Why the Light Brigade was Lost} (London, Random House, 2004) 245; S J G Calthrope, \textit{Letters from Headquarters on the realities of the war in the Crimea, by an Officer of the Staff} (3rd edn, London, Murray, 1858); T Lucking, ‘Cardigan v Calthrope’ <http://crimeantexts.russianwar.co.uk/topics/carvcal.html> accessed 8 January 2011.
  \item Coburn (n 7); McNab (n 11); [2002] UKPC 22.
  \item Coburn (n 7) 160-174; [2002] UKPC 22 [6].
  \item Coburn (n 7) 18, 23, 69, 160, 185-186, 286.
  \item Panorama (n 2); Coburn (n 7) 290.
\end{enumerate}
preventing publication relating to UKSF service. Coburn’s account is distinguished by his accusations that the Patrol was abandoned by Headquarters in an effort to curry favour with General Schwarzkopf, the Commander in Chief who distrusted Special Forces. This accusation did not form part of any court proceedings but was doubtless a significant concern for the MoD.

Once written, Coburn submitted his manuscript for vetting just as de la Billièrè, McNab and Ryan had done. Rather than vetting the manuscript, the MoD threatened legal action, against the publishers Hodder & Stoughton and Reed. It appears the decision to pursue was taken not on the basis of national security but on principle; Coburn was the first to breach the contract so the decision was taken at the highest levels following correspondence between the Commanding Officer and the Prime Minister. As a result, proceedings were commenced in both England and New Zealand to obtain an injunction on publication. The English proceedings were subsequently stayed after Coburn emigrated. As such, all legal proceedings took place under New Zealand jurisdiction.

III – Legal Proceedings

The initial case was heard before Salmon J and focused on breach of contract. Coburn’s multifaceted defence was based around a broad theme that he had signed against his will. Counsel for Coburn addressed a range of issues: valuable consideration; duress; undue influence; and unconscionable bargain.

Overall, judgement was for Coburn. Salmon J found that the order to sign was unlawful and that once discharged, Coburn should enjoy full civil rights. Furthermore, Coburn was subject to undue influence and economic duress. However, Coburn’s submissions that he had not received valuable consideration were rejected. The MoD appealed Salmon J’s findings whilst Coburn cross-appealed citing a lack of consideration and unconscionable bargain. The New Zealand High Court’s re-examination supported Salmon J’s findings relating to consideration and

28 The exception to this was Major Peter Ratcliffe, war time RSM of 22nd SAS, who by his own admission consigned his copy of the confidentiality contract, unsigned, to the waste paper basket: Panorama (n 2); ‘60 Minutes: Soldier Five’ 60 Minutes (TVNZ, New Zealand, 8 April 2001).

29 General Schwarzkopf was said to have seen too many patrols get into trouble in Vietnam, leaving him firmly against the use of Special Forces: Coburn (n 7) 278; de la Billièrè (n 11) 224; Panorama (n 2).

30 Coburn (n 7) 290-291; Panorama (n 2).

31 Coburn (n 7) 291.


33 Coburn (n 7) 299.

34 [2001] BCL 87.

35 ibid.

36 ibid.

37 ibid.

unconscionability. However, the court found the contract essentially valid. An injunction was not granted but an account of profits and an assessment of damages ordered. Coburn then appealed to the Privy Council against the financial orders and the consideration ruling. The MoD failed to lodge a cross-appeal in time. The Privy Council dismissed the appeal. Throughout the MoD used official channels to hinder Coburn’s legal team.

IV – Legal Issues
The case raised a number of legal issues: consideration; the legality of the order to sign; duress; and the question of motive. Whilst Coburn’s motives were well publicised, the MoD’s were not. Without effectively defining these, it is impossible to judge both the efficacy of the MoD’s approach. The contract itself, however, was extremely simple:

"In consideration of my being given a (continued) posting in the UKSF from 28 October 96 (date) by MOD, I hereby give the following solemn undertaking binding me for the rest of my life:

(1) I will not disclose without express prior authority in writing from MOD any information, document or other article relating to the work of, or in support of, the UKSF which is, or has been in my possession by virtue of my position as a member of any of those Forces.

(2) I will not make any statement without express prior authority in writing from MOD which purports to be a disclosure of such information as is referred to in paragraph (1) above or is intended to be taken, or might reasonably be taken, by those to whom it is addressed as being such a disclosure.

(3) I will assign to MOD all rights accruing to me and arising out of, or in connection with, any disclosure or statement in breach of paragraph (1) or (2) above.

(4) I will bring immediately to the notice of MOD any occasion on which a person invites me to breach this contract."

IV(a) – Consideration and the Royal Prerogative
The contract is entirely couched in the traditional language of contract and purports to be bound by contract law. However, it does not appear to conform to those rules. Rather, it appears prima facie to be a case of the MoD gaining something for nothing. English contract law, which is to all intents and purposes identical to New Zealand law.
law in this respect, demands a promise be supported by consideration. Coburn alleged that he received nothing for his promise to refrain from “disclosing any information, document or other article relating to the… UKSF”. This placed Coburn at a disadvantage. The preamble states that consideration would take the form of “a (continued) posting” in the UKSF - apparently a legal guarantee of employment within UKSF. It was suggested by Coburn’s counsel that such a guarantee could not be legally binding as a member of the armed forces is subject to the Royal Prerogative, a residual power retained personally by the Monarch and by and large, not subject to Parliamentary or judicial scrutiny. Any contract would limit the disposition of the armed forces as Queen’s officers could be held liable for breach of contract. Such a notion is patently absurd as the MoD itself admitted. Therefore, the contract appears to be void for want of consideration. In reply, the MoD submitted that forbearing to ‘RTU’ (Return to Unit) Coburn was good consideration, an argument accepted by the High Court and the Privy Council. Such forbearance was justified by reference to Alliance Bank (Limited) v Broom which established that a forbearing act constituted good consideration. If applied to RTU, as the Privy Council found, then it appears the contract exchanged a moment’s forbearance for a lifetime’s silence as any contractual halt would be fleeting.

If this reasoning is correct, and the MoD accepted it as such, what benefit accrued to Coburn? It is a general rule that the law will not seek to judge the adequacy or inadequacy of consideration offered. Anything may be construed as consideration even if only of value to the parties. Counterbalancing this is the principle that a court will not assign retrospective value to valueless objects. If there is no value then consideration is held to be illusory and the court may disregard it. When the Royal Prerogative is taken into account, it appears that the consideration offered could reasonably be described as illusory. Furthermore, the judgment of Wickham & Burton Coal v Farmers Lumber suggests such a promise may be considered a ‘discretionary promise’, namely, that it is to be fulfilled at the promisor’s discretion. Given the repeatedly emphasised clash between contract law and the Royal Prerogative, this is as far as it is possible to stretch the MoD’s undertaking. Such a promise is by its nature unenforceable, lacks foundation and is therefore illusory. Thus, even at the

48 To ‘RTU’ means to remove a soldier from the Special Forces and return him to his parent unit. This is generally considered to be a severe disciplinary measure or an indication that a soldier was not up to the role.
49 The Alliance Bank (Limited) v Broom (1864) 62 E.R. 631.
50 Chitty (n 45) para 3-014.
51 Chitty (n 45) para. 3-015; Chappell & Co Ltd Nestle Co Ltd [1960] A.C. 87.
53 Chitty (n 45) para 3-023.
54 Chitty (n 45) para 3-025; Wickham & Burton Coal Co. v Farmers' Lumber Co. 179 N.W. 417 (1920).
moment of contracting, Coburn could have been ‘RTU’ed’ for any one of a dozen reasons. Coburn therefore received no consideration in return for his promise.

The discussion above is predicated upon the notion that Coburn would reveal information about his service, a presumption which is not wholly unreasonable. As we know, Coburn did in fact break his silence and publish his memoirs, just as McNab and Ryan had done. However, there is no information in the public record that suggests that Coburn intended to publish in 1996. Neither did the factual circumstances at the time support such a conclusion. Bravo Two Zero consisted of eight men: three died and only two published. Furthermore, the two who had published had both left UKSF within three years of coming home. Coburn, on the other hand, remained with UKSF, serving in a variety of roles until after the contract was introduced, five years after being offered medical discharge. These facts suggest that, on the balance of probabilities at the time, Coburn would have remained silent. It is an established principle of contract law that consideration given for a promise that would be performed regardless is considered illusory.

Due to the Royal Prerogative, which legally underpins the British Army, no contract can fetter the army’s dispositions. As such, no Queen’s officer can be prevented from posting a soldier because of the common law powers of contract. Without this ability to prevent Coburn’s dismissal, consideration is void. Why then did the Appellate Courts find valid consideration even after the MoD accepted that a contract cannot fetter the Royal Prerogative? It is submitted that neither tribunal looked behind the law to the underlying facts. The precedent of Alliance Bank v Broom is weighty; it has not been doubted for over a century. On that basis, the Court of Appeal found that forbearance was good consideration, a general principle which is not doubted here. However, what the courts appear to have failed to consider was how long forbearance could last. As has been demonstrated, the notion that forbearance could be anything more than illusory cannot be reconciled to the facts. The consideration offered is thus equally illusory.

It was suggested by Tipping J. in the Court of Appeal that an alternative approach to characterising the consideration would be to follow the approach taken in Williams v Roffey. The novel approach to consideration in that case allowed Williams to claim increased consideration for performing a duty they were already bound to complete by contract. The justification for this divergence from the classic rule of consideration in Stilk v Myrick focused on the benefit accrued by the promisor.

55 Ratcliffe (n 18) 445.
56 Ryan (n 11) dust jacket; McNab, Seven Troop (London, Bantam Press, 2008) 8.
57 Coburn (n 7) 285.
58 Chitty (n 45) para 3-024; Well Barn Farming Limited v Peter Brynne Backhouse [2005] EWHC 1520 (Ch).
59 (1864) 62 E.R. 631.
was held that the extra payment allowed Williams to complete on time, saving Roffey from a penalty clause and gaining a material benefit.\textsuperscript{63} It was suggested by Tipping J that Coburn gained a material benefit by being allowed to remain with 22\textsuperscript{nd} SAS rather than being posted to the Parachute Regiment.\textsuperscript{64} This argument has more substance than the others as it does not require forbearance by the MoD. However, the judgment in \textit{Williams v Roffey} has never been followed but rather has often been doubted or disregarded, even in lower courts.\textsuperscript{65} \textit{Williams v Roffey} does not follow the line of case law from \textit{Stilk v Myrick} via the House of Lords in the decision in \textit{Foakes v Beer}.\textsuperscript{66} On the facts, the judgment appears reasonable, delivering justice to the parties involved but does so at a price; legal confusion. In the present instance, the line of argument suggested by the Court of Appeal was not picked up nor followed by the Privy Council. Therefore it is submitted that whilst plausible, this construction is not truly persuasive.

**IV(b) – Official Secrets Act v Contract Law**

If contract is incapable of binding a soldier then why did the MoD use it, especially when the Official Secrets Act could prevent disclosures? To establish this, it is necessary to consider earlier disclosures. The case of \textit{R v Ponting} is an earlier example of disclosure.\textsuperscript{67} Ponting passed documents to a Member of Parliament relating to the sinking of \textit{ARA Belgrano}.\textsuperscript{68} He claimed that he was acting in the public interest but was charged under section 2 of the Official Secrets Act 1911.\textsuperscript{69} Under that act, acting in the public interest was not a sufficient defence; intent alone was sufficient mens rea. Ponting admitted breaching the act yet ‘the jury couldn’t be prevailed on to convict’.\textsuperscript{70} A closer parallel may be the Spycatcher case, a memoir begun in ‘fester ing anger’ over a pension.\textsuperscript{71} Whilst the book was freely available elsewhere, the British Government strove to prevent its publication in the UK, prompting a series of challenges in the name of freedom of speech.\textsuperscript{72} The injunction was lifted on a second appeal, after the House of Lords had previously ruled that it

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\textsuperscript{63} [1989] EWCA Civ 5
\textsuperscript{64} [2002] 2 NZLR 91 [51]
\textsuperscript{66} \textit{Foakes v Beer} (1884) 9 App Cas 605 (HL).
\textsuperscript{67} \textit{R v Ponting} [1985] Crim. L.R. 318.
\textsuperscript{68} [1985] Crim. L.R. 318.
\textsuperscript{69} The Official Secrets Act 1911 (1 & 2 Geo. 5 c. 28).
has a duty to ‘protect the Security Service’.\(^{73}\) It is worth noting, as in Coburn’s case, the British Government was unwilling to accept ‘no’ for an answer, leading to multi-case litigation across two hemispheres.

The case of Tomlinson, in which an MI6 operative endeavoured to publish a book after his failed attempt to take MI6 to an employment tribunal, is equally instructive.\(^{74}\) Like Coburn, he then went to New Zealand and attempted to negotiate via counsel but left prior to agreement.\(^{75}\) Eventually Tomlinson returned to the UK, pleaded guilty to three counts of breaching section 1 of the Official Secrets Act 1989 in relation to his publication of his dispute with MI6, in preference to a prolonged period on remand.\(^{76}\) Tomlinson was remanded as a Category A prisoner, the harshest regime for those ‘whose escape would be highly dangerous’,\(^{77}\) a categorisation designed to encourage a guilty plea and protect MI6 from the hazards of a jury trial.\(^{78}\)

The Official Secrets Act is a well respected piece of legislation with a history stretching back to 1889.\(^{79}\) The current version of the act was enacted to remove the problems highlighted by Ponting’s case.\(^{80}\) No public interest defence exists under the act and whilst numerous calls have been made for such a defence, Parliament has persistently excluded such a defence. Even the ‘Whistleblower Act’ specifically excludes the Official Secrets Act.\(^{81}\) Therefore, any soldier subject to the act could not make disclosures for fear of imprisonment. Why then did the MoD not choose this ‘off the shelf package’ instead of an untested contract? Section 2(1) of the act is virtually identical to clause 1 of the contract, indicating similar intent.\(^{82}\) The main difference is that to breach the contract, a disclosure need not be damaging, extending the contract beyond the act. However section 2(2) of the act defines ‘damaging’ extremely broadly. Furthermore, in both published cases, there was specific consideration of the damage caused by the disclosures, suggesting that the MoD felt a need to prove that the disclosure was damaging.\(^{83}\) The weakness of the Official Secrets Act is that if you are prepared to ‘do the time’ then there is no bar to doing


\(^{75}\) Statement by Warren Templeton, Barrister, Southern Cross Chambers, Auckland, New Zealand (Personal email correspondence 25 January 2011).

\(^{76}\) Tomlinson (n 74) 178.


\(^{78}\) Tomlinson (n 74) 177.

\(^{79}\) Official Secrets Act 1889.


\(^{81}\) ibid 8; Public Interest Disclosure Act 1998.

\(^{82}\) The Official Secrets Act 1989 (c. 6); [2008] EWHC 1542(QB) [10].

\(^{83}\) [2008] EWHC 1542(QB); [2001] BCL 87.
'the crime;' there are no means to prevent publication. The contract addresses this in clause 3 by removing any profit from disclosure. This would clearly affect those seeking to profit by publishing sensationalist accounts, the original motivation for the contract. This desire is further reflected in clause 2 which guards against cases such as McNab where sensationalism outweighs fact. Preventing publication is something the Official Secrets Act cannot provide along with a means of silencing disclosures; it is an entirely punitive measure. The law of contract provides equitable remedies of specific performance and injunction which can prevent publication, even by a principled defendant willing to endure imprisonment. The efficacy of this approach is demonstrated by *R v Griffin*, the case of an ex-SAS conscientious objector silenced by an injunction. It seems likely that Coburn would have been silenced but for the MoD’s failure to submit the paperwork in time. A further benefit is the lower burden of proof and lack of a jury making it easier to gain a remedy. Perhaps the greatest benefit is the imposition of terms without further legislation, something that the Commander of 22nd SAS believed would be difficult. The British Government has had to contend with a series of breaches of the act, demonstrating its inherent weaknesses: a need for separate injunctions to be sought; the risk of a jury trial; and the lack of deterrent to the principled and aggrieved defendant, like Coburn. It is submitted that whilst more legally respected, the act would not have gagged Coburn. A jury trial of one of the heroes of Bravo Two Zero would have created considerable public interest and potentially a Ponting style acquittal. By imposing the contract, the MoD appears to have taken a calculated risk as to the validity of the contract in an effort to avoid the risks of such a trial.

**IV(c) – Duress**
Coburn’s legal team did not challenge the validity of the contract solely on the grounds of consideration. The circumstances under which Coburn’s signature was obtained were also challenged and were said to amount to duress. Coburn was ordered to Hereford where he and another soldier were to report to the Adjutant’s office, adjacent to the Commanding Officer’s office, to sign the contract. Neither soldier had seen the contract before nor was the provision of independent legal advice permitted due to the classified status of the contact even before signature. Those who did not sign would be ‘RTU’d’.

At this juncture, it is important to consider how the threat of being RTU’d would be viewed by signatories to the contract. Technically speaking, being ‘RTU’d’ is simply an administrative procedure within the British army; files are simply marked ‘service skills no longer required’ and no blame is attached. Although no blame is attached,
the effect is usually instantaneous with soldiers finding themselves at the dreaded ‘Platform Four’ of Hereford Station within the hour. This is not the view taken within the 22nd SAS Regiment, a fact noted, albeit briefly by the Privy Council. As a sanction usually imposed for a disciplinary offence, being RTU’d involves the dishonour of exclusion from the regimental community with its unique service experience and higher pay rates. Furthermore, the sheer effort required to pass SAS selection, a fact attested to by all memoirists, makes such exclusion doubly painful. RSM Ratcliffe described being RTU’d as “the fate most dreaded by...members of the SAS”. It is particularly important to keep these attitudes in mind when considering the claim of duress.

Coburn’s circumstances were held to amount to economic duress by in the High Court due to the loss of the higher pay the SAS received; Trooper Coburn was paid as a Corporal. As there was no threat of physical harm to Coburn, this was the only form of duress that could apply. By contrast, the Court of Appeal rejected Salmon J’s finding on the point, holding that Coburn was not ordered to sign. The Privy Council concurred with the Court of Appeal declaring that duress consists of illegitimate pressure amounting to compulsion. Thus, any pressure applied was legitimate and did not amount to compulsion. Is this, however, a correct reading of the facts?

The pressure applied by the MoD was unquestionably legitimate; the threat to reassign a soldier was well within the power of the Royal Prerogative as has been noted earlier. It was held in *Universe Tankships v International Transport Workers’ Federation* that only illegitimate pressure would suffice for duress. However, a legitimate act can amount to duress if coupled with an illegitimate demand. Although the act of reassigning Coburn was entirely legitimate, it can be argued that the act of gagging him even into civilian life is an illegitimate, even draconian, use of military law and an extremely unusual use of contract. The Court of Appeal briefly considered the extent of the confidentiality contract but did not engage with the issue, merely accepting its legitimacy. The Privy Council also did not consider the issue. It is submitted that this combination of threatening Coburn with being ‘RTU’d’ and gagging him beyond his military service would equate to illegitimate pressure. For

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93 [2002] UKPC 22 [6].
94 [2002] UKPC 22 [6]; de la Billière (n 1) 97-98.
95 de law Billière (n 1) 98-101; Coburn (n 7) 170, 173; Ratcliffe (n 18) 54-68.
96 Ratcliffe (n 18) 445.
97 [2001] BCL 87; Ratcliffe (n 18) 79.
100 *Universe Tankships Inc of Monrovia v International Transport Workers’ Federation* [1982] 2 All ER 67; Chitty (n 45) para 7-005.
101 Chitty (n 45) para 7-008; *Thorne v Motor Trade Association* [1937] AC 797, 806.
102 *Panorama* (n 2).
this to be the case, the legitimate pressure should be a ‘threat of some gravity’.104 Being ‘RTU’d’ would clearly represent such a threat to a member of 22nd SAS, in light of the discussion on RTU above. It should be noted that there is no suggestion that imposing such confidentiality on a soldier during his service would be illegitimate. Whilst the Privy Council did not engage with the issue, it did justify the imposition of the contract by reference to the supposed demand for such a contract from within UKSF,105 a demand said to be caused by the series of memoirs that had already been published, memoirs that were branded ‘disgusting’, ‘untruthful’ and ‘cheap war fiction’ whose authors had opened themselves to the ‘contempt or ridicule’ of other veterans.106 However, whilst the veterans’ disgust is well attested, the demand for the imposition of the contract was not.107 Panorama previously revealed considerable unrest within the Special Boat Service causing the Commanding Officer to write to the UKSF’s Director, calling the contract ‘morally offensive’ and ‘insulting’.108 This would appear to cast doubt upon the board’s argument that the contract was not illegitimate as UKSF desired it.

The second factor relevant in the determination of duress is compulsion. It is no longer necessary to demonstrate that the victim’s will was overborne.109 The test is rather that the alternative must not equate to a real choice.110 Both Appellate Courts took the view that Coburn had a reasonable alternative, a posting to the Parachute Regiment. However, a more detailed analysis of Coburn’s service suggests an alternative construction. Coburn never served with his nominal parent unit, as the Court of Appeal noted.111 Yet the issue goes deeper still. Coburn was recruited directly into NZSAS, although he did spend two years on Garrison Duty,112 before resigning from NZSAS and joining the 22nd SAS Regiment in search of combat experience where he served for the remainder of his military career.113 Coburn had little experience of normal soldiering, no experience with the British Army and no roots in Britain. It is submitted that these circumstances amount to compulsion on Coburn to remain in 22nd SAS at any cost. Yet none of these unique circumstances were considered by the Appellate Courts. Whilst the pressure might not amount to compulsion for others, like McNab who won the Military Medal and promotion within the Royal Green Jackets, it almost certainly would for Coburn.114 In failing to

104 Chitty (n 45) para 7-033.
107 Panorama (n 2).
108 ibid.
109 Chitty (n 45) para 7-030; Dimska Shipping Co SA v International Transport Workers Federation (The Evia Luck) (No.2) [1992] 2 A.C. 152.
110 Chitty (n 45) para 7-031.
111 [2002] 2 NZLR 91 [64].
112 Coburn (n 7) 133, 136-139.
113 ibid 156.
consider this, it is submitted that the Privy Council made a mistake that led to a misinterpretation of the nature of the compulsion suffered.

An alternative construction is that the threat of being ‘RTU’d’ amounted to *lawful duress*, a relatively rare construction applied where lawful commercial pressures amount to compulsion.\(^{115}\) *Chitty* notes that the Privy Council decision rules out such a construction.\(^{116}\) However, when the facts of Coburn’s service are considered, it may become a viable construction. This uncertainty further highlights the fact that a finding of duress hangs very much on a subjective analysis of facts. Whilst the Appellate Courts have adroitly applied the established law, it appears that they have been less discerning in analysing and understanding the unique facts of service in the UKSF, relying too much on the MoD’s interpretation.

**IV(d) – Undue Influence**

Running parallel to the doctrine of duress is the equitable doctrine of ‘undue influence,’ which received consideration, in a dissenting judgement from Lord Scott.\(^{117}\) Undue influence is based on the rebuttable presumption that an imbalance exists between contracting parties that would lead to an inequitable result. Coburn alleged that the relationship between an officer and soldier was one such example, the burden of proof falling on him.\(^{118}\) As a general rule, undue influence usually arises through a fiduciary relationship.\(^{119}\) The Privy Council held that this relationship did not constitute undue influence despite regimental pride and the hierarchical nature of military relationships.\(^{120}\) The one point of contention for the majority was the lack of legal advice made available to Coburn, although this does not necessarily vitiate a contract.\(^{121}\) This analysis is superficial at best and once again fails to consider the true nature of the military. However, Lord Scott was of the opinion that the burden of proof lay with the party seeking to enforce the contract, suggesting that the easiest way to demonstrate this would be to offer independent legal advice.\(^{122}\) He equated the relationship between Coburn and his Commanding Officer to that of a Mother Superior and Postulant; following *Allcard v Skinner*.\(^{123}\) This was a Victorian decision, to prevent relationships of this type being abused. Both involve a contract being entered into in order to retain a place in an order and then seeking to reclaim on departure.\(^{124}\) Furthermore, Lord Scott noted that soldiers do not serve subject to contract but rather at royal pleasure and therefore greater care should be taken over

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\(^{115}\) *Chitty* (n 45) para 7-087.

\(^{116}\) ibid.

\(^{117}\) [2002] UKPC 22.

\(^{118}\) *Royal Bank of Scotland plc v Eltridge (No.2)* [2002] AC 773.

\(^{119}\) *Chitty* (n 45) para 7-034.


\(^{121}\) *Chitty* (n 45) para 7-035.

\(^{122}\) [2002] UKPC 22 [39].

\(^{123}\) ibid [40]; *Allcard v Skinner* (1887) 36 Ch D 145.

\(^{124}\) (1887) 36 Ch D 145; [2002] UKPC 22 [41].

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such contracts. Finally, Lord Scott concurred with Salmon J; Coburn had been ordered to sign, amounting to undue influence. This analysis appears prima facie to fit the facts and the nature of military relationships. One major issue which neither side of the dispute appears to have considered, however, is that on the facts, Coburn never spoke to his Commanding Officer directly about the contract. He was ordered to report for signing and then had a shouted conversation with the Adjutant through the clerk. The Commanding Officer did speak to Coburn’s squadron but only gave the barest details.

Throughout the case, there has been little conflict of law but much conflict of perspective and interpretation of the nature of SAS service. Both sides accepted the following key points of law: forbearance could equate to consideration; the clash with the Royal Prerogative; and the nature of duress. Yet no case can be decided on law alone; facts must be correctly interpreted and applied. There has been limited examination of the unique conditions of SAS service, most particularly the nature of military relationships and ‘RTU’. Quite why this analysis was not made cannot be determined at this distance. However a variety of reasons appear to fit the facts. Coburn alleges a total lack of sympathy from the Court of Appeal, which whilst no doubt a heavily biased opinion has some merits. Alternatively a desire to send a message to those still serving may have motivated the board, particularly as this was the first breach of the contract. Finally, there is the possibility that there was some suspicion of Coburn’s motives, especially given the other memoirs. Whatever the reason, it is impossible to avoid the conclusion that the contract and emerging dicta are highly questionable, especially given the apparent lack of concern for the conflict between Royal Prerogative and contract law. However, it must be stressed that despite these weaknesses, the case has become a locus classicus being cited in many prestigious textbooks including Chitty on Contracts and Goff and Jones.

IV(e) – Imposition of the Contract and Freedom of Expression

It has often been said that a government’s first duty is to protect. In recent years, this has become a legal norm. It is also an often quoted mantra that governments which allow their citizens to remain free remain strong. The UKSF is an exemplar of this, balancing secrecy with greater freedom than most military units. Freedom and secrecy do not make easy stable mates; balancing the competing needs is a fine art. The confidentiality contract appears to upset the balance within UKSF. The moral and

\[125\] [2002] UKPC 22 [42].
\[126\] ibid [44-45].
\[127\] ibid [6-8].
\[128\] ibid [6].
\[129\] Coburn (n 7) 305.
A Considered Silence

practical cases for and against this imposition is entirely separate from the legal issue and it is the latter which is explored further below.

The case for imposing the contract revolves around the notion of protection. The MoD sought to protect past, present and future operations, and past, present and future members and their families. Furthermore, they sought to protect the SAS’s fighting efficiency, even their near legendary reputation. Finally, it sought to prevent further SAS memoirs.

The case against the contract primarily rests upon the unreasonable burden imposed on signatories which limits their freedom of expression for life. Additionally, there is a specific case against imposing the contract on Coburn, which undermines the contract’s justifications. Firstly, his signature was effectively obtained through duress, if not legal then moral. Secondly, every serving member had something to lose, their highly coveted posting to UKSF whilst new recruits merely had something to gain. Thirdly, de la Billière, McNab and Ryan had already published their memories so their experience could no longer be described as a secret. Furthermore, the dead were already defamed. Imposing the contract would have prevented any attempts to correct these accusations. Coburn’s case also suffered political interference, casting doubt on the verdicts.

IV(f)(i) – Freedom of expression

At the heart of the matter is a clash between the public interest and individual rights, which has long been the subject of jurisprudential debate. The MoD saw the contract as beneficial to UKSF. In essence, the good of the majority overrode individual rights, a position which is essentially based on the utilitarian argument proposed by Bentham and refined by Mill. However, in its purist form, utilitarianism does not place limits upon the harm imposed upon the individual. Thus, on that basis, the MoD could deny an individual’s right to freedom of expression if the greater good was big enough. It is submitted that such an argument requires limitation. Some rights, such as the right to freedom of expression may not be extinguished. Yet there appears to be a difficulty in identifying the rights which have in fact been infringed. The Human Rights Act 1998, which came into force in 2000, grants legal protection to the right to freedom of expression. However, when the contract was imposed, no protection existed in English law, although there was protection under New Zealand law and via the European Convention on Human Rights. Dworkin suggests that rights which are not enshrined in law are merely abstract and cannot be automatically applied.

Rather, it is principle that must be applied in coming to a decision. In this case, a principle is something observed as a requirement of justice rather than for policy reasons.\footnote{137} It seems that this was the approach taken by the Court of Appeal in refusing to grant an injunction against publication due to the unique facts of Coburn’s case.\footnote{138} Without an entrenched right, the Court of Appeal followed the premise that English law does not specifically recognise and protect the right to freedom of expression but instead assumes that everything is allowed unless specified.\footnote{139} The Court of Appeal then looked for exceptions, finding one in Coburn’s contractual duties. However, at this point, the Court of Appeal began constructing a case based upon broad principles of public policy to vitiate this prohibition.

\textbf{IV(f)(ii) – The European option}

The European Convention on Human Rights entrenches four hundred years of European musings on human rights including the right to freedom of expression. Although not incorporated into UK law until the implementation of the Human Rights Act, it was possible to gain direct access via the European Court of Human Rights.\footnote{140} Coburn did not avail himself of this opportunity and at this distance, it is not possible to know his reasons. However, it seems there are two plausible explanations for Coburn’s decision: firstly, the fact that litigation would take place in Strasbourg when Coburn had relocated to New Zealand to avoid harassment and gain legal aid; and secondly, litigation would be in addition to defending the MoD’s action, which would have resulted in prohibitive costs for Coburn.\footnote{141} After 2000, Coburn could have mounted a legally aided challenge before the English courts yet by this point, the MoD had already commenced it case which had ended with Coburn being allowed to publish. If Coburn had sought to seek such redress through the English courts, would he have had a case?

Article 10 of the Convention protects the right to freedom of expression subject to certain exceptions, \textit{inter alia}, in the interests of national security.\footnote{142} \textit{Prima facie}, Coburn had a case. His rights were restricted and it is submitted that national security had not been harmed. However, is this position supported in law? In \textit{Rommelfanger v Federal Republic of Germany}, the European Court of Human Rights held that restrictions are justified when vital to an employer’s interest; specifically it was reasonable to limit Rommelfanger’s freedom of expression on abortion because its prohibition was central to Catholic beliefs.\footnote{143} It is arguable that secrecy is to UKSF what abortion is to Catholicism. Yet for Catholicism, the prohibition on abortion was absolute, unlike secrecy for Bravo Two Zero, making it possible to distinguish \textit{Rommelfanger} from Coburn’s case on the facts, whilst also suggesting that it is analogous to less publicised operations which still retain the secrecy so vital to UKSF. \textit{Fuentes v Spain} also supports Coburn’s case, as it held that a contractual relationship

\footnotesize{137} ibid.
\footnotesize{138} [2002] 2 NZLR 91.
\footnotesize{139} [2002] 2 NZLR 91 [108].
\footnotesize{140} Human Rights Act 1998 c.42.
\footnotesize{141} Coburn (n 7) 298.
\footnotesize{142} The Convention for the Protection of Human Rights and Fundamental Freedoms, art 10.
involving a public service was not enough to restrict the employee’s freedom of expression even though it was lawful to dismiss him. This decision appears to suggest ‘gagging’ would breach the right to freedom of expression although being ‘RTU’d’ would not. Assuming there had been a breach, such a contravention may be excused on grounds of national security. In this area, the European Court of Human Rights has granted wide ranging powers to limit expression, upholding the imprisonment of those who reveal secrets. Furthermore, with regards to the Spycatcher case, the European Court of Human Rights held that when disclosures are prejudicial to security, ‘gagging’ is legitimate. This majority ruling Observer v UK must be compared to the unanimous ruling in the Spycatcher case that information in the public domain cannot be prejudicial to security. Spycatcher was circulating abroad long before Coburn’s case. Equally, McNab published first. As such, Coburn may have been able to make a case. However whilst he could publish, he still needed to account for profits. Thus whilst the Convention offered Coburn a chance to assert his rights, the outcome would have been the same had Coburn pursued this option.

**IV(f)(iii) – The benefits of imposition**

As the MoD’s case for imposing the contract was essentially based on the utilitarian principle of the greatest good for the greatest number and must be tested, the benefit must be weighed against the harm and cases evaluated to decide if this argument holds water. Maintaining operational secrecy is clearly beneficial, provided the operations are in the public interest. Defining the public interest is clearly a matter for government and in this instance there must merely be greater benefit. This benefit is established if maintaining secrecy protects UKSF, both regarding its operations and from retaliation from terrorist groups. In addition, there is a benefit to service families, particularly the bereaved. However, the other benefits are more difficult to prove, particularly the benefit of stifling SAS memoirs by limiting, though not preventing, publication and demanding the profits of publication. The published memoirs are of dubious quality and very little academic value yet they have created a popular image that is by and large flattering if unrealistic. However, in a free society, this alone cannot be enough to justify the suppression. Mill’s On Liberty addresses the issue in the following terms: any statement no matter how true will, without frequent discussion, become ‘dead dogma’. Thus the process of disputing and questioning, accompanied by rebuttal and justification, keeps the fact a ‘living

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144 The Convention for the Protection of Human Rights and Fundamental Freedoms, art 10(2).
146 Observer and Guardian v UK A 216 (1991) 12 EHRR.
148 Notes of evidence (n 32) 3, 184-185.
truth’. 152 According to Mill, there is a benefit to the majority in letting the minority speak. While the enjoyment of a reading public cannot be reconciled with servicemen’s safety or the hurt felt for slandered comrades, there is less harm inflicted on UKSF than on the reading public. The most challenging calculation relates to threats to serving and former members from terrorists. All manuscripts were submitted to the MoD where the texts and illustrations were distorted to protect individuals. 153 This point was raised in the High Court over the identity of ‘Gonz’ in Eye of the Storm. 154 It was suggested that even with these precautions ‘Gonz’ could be identified. How realistic this is cannot be assessed. On careful examination the author can only distinguish a blonde of average height. 155

**IV(f)(iv) – Bravo Two Zero: a special case?**

Thus the case in favour of imposition is subjective and open to broad challenge. The case of Coburn is open to narrower challenge. Firstly, there is the issue of operational secrecy, an issue raised in the European Court of Human Rights. By the time Coburn left UKSF, McNab and de la Billière had published twice, Ryan once and a newcomer, Crossland, published on another patrol’s experiences. 156 By the time Coburn published, a veritable cornucopia of authors had published. 157 In addition, the explorer and former UKSF member, Michael Asher, had published his investigation. Although a superficial analysis, Asher not only detailed the events and personnel involved but also followed the patrol on the ground, in itself significant given that tensions between Iraq and the United Kingdom. 158 Yet a former member of 23rd SAS was allowed into Iraq and extended every courtesy; something that would clearly require at the very least consular assistance. Furthermore, to track the patrol, some information from those with knowledge of the patrol would be required. Since the work discredited McNab and Ryan, it follows that that information must have come from elsewhere. It is submitted that this indicates that Asher’s account was assisted by the MoD. Certainly counsel for Coburn subscribed to this view. 159

The events of the patrol are clearly not secret and cannot be described as such. However, the MoD maintained just that. In addition they suggested that publications would further endanger lives by revealing the tactics used by UKSF. This was accepted in R v Griffin but does not stand up to scrutiny in this case. 160 No accounts of the patrol deal with unpublished tactics, a fact confirmed by two military historians

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152 ibid 61.
153 McNab (n 11); Ryan (n 11), Ratcliffe (n 18); Coburn (n 7).
154 Particular concern appears to have been attached to this soldier due to his involvement in the ‘Death on the Rock’: Notes of evidence (n 32) 3, 184-186.
155 Ratcliffe (n 18) picture inset two.
156 McNab (n 11); McNab (n 98); Ryan (n 11); de la Billière (n 11); Billière (n 1); P Crossland, *Victor Two: Inside Iraq: The Crucial SAS Mission* (London, Bloomsbury, 1996).
157 McNab (n 11); McNab (n 98); Ryan (11); Billière (n 11); Billière (n 1); Ratcliffe (n 18); Crossland (n 162); M Curtis, *CQB: Close Quarter Battle: The Explosive True Story of 15 Years Under Fire* (London, Bantam, 1997); C Spence, *Sabre Squadron* (London, Penguin, 1998); G Hunter, *Shooting Gallery: The Elite within the elite – one man’s secret wars* (London, BCA, 1999).
158 Asher (n 16).
159 Templeton (n 75).
called to give evidence. Furthermore many of the engagements recounted have since been discredited. Of course as the first challenge to the contract, the MoD could not think just about Bravo Two Zero but was considering other potential challenges. However, this is unsupported as all other deployments by UKSF in Iraq utilised tactics developed by the Long Range Desert Group during the 1940s which cannot possibly be described as secret. Protection of operations cannot therefore reasonably justify the impositions on Coburn, something admitted in correspondence by the Colonel-Commandant. These tactics, whether secret or not, failed as three men died. Further justification was provided by suggesting that the contract would protect families of the deceased. Ryan’s memoir is ample justification for this. However, in this specific case, the dead were already defamed and Coburn had publicly announced a desire to exonerate Phillips. It is perhaps reasonable to fear that Coburn would merely fuel the fire. However, whilst continuing to pursue Coburn the MoD appears to have aided Asher’s attempt to exonerate Phillips, suggesting that further intervention was not an aim. By gagging the survivors, a ‘No Comment’ policy in force to this day, there were no means to straighten the record. This issue is unique to Bravo Two Zero as prior to this no patrol had engaged in such a public dispute, presenting a powerful motive against imposing the contract. Yet whilst allowing publication, it carried no guarantee that controversy would be resolved and further publications could deepen divides, a particular motivation for the MoD as Coburn blamed failings in the chain of command.

**IV(f)(v) – Equity and coming with clean hands**

Whilst motivations are irrelevant to proving an actionable breach, they are extremely important in judging the equity involved. The case for imposing an equitable remedy is damaged if the means employed to gain the remedy are themselves inequitable. The MoD’s attempts to hinder the Coburn’s defence have already been alluded to. The hindrance is possibly more accurately described as rank political interference. The interference began at the earliest stages of the legal process, with communications between the Colonel-Commandant and the Prime Minister, urging a vigorous pursuit on principle that it was the first breach. It must follow that a decision taken at this level will inevitably become subject to political motives. This begins to undermine the justification for an equitable remedy. It has long been an equitable maxim that those

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161 [2001] BCL 87; Coburn (n 7) 300-301.
162 Bolt (n 9) ch.3; Asher (n 16); Coburn (n 7).
164 Crawford (n 15) 57.
165 Coburn (n 7) 292.
166 Norton-Taylor (n 169); T Newton-Dunn, ‘War of Words: Court fight over book could lift the lid on SAS secrets’ The Mirror (London 21 October 2000).
167 Asher (n 16) 14.
168 Statement by Operations Directorate, MoD (Personal letter 18 January 2011); Coburn (n 7) 288.
'who come into equity must come with clean hands'. 170 The level of cleanliness must be subject to debate when decisions are taken at such a level. Further indications of political motivations must be reflected by the timing of the Privy Council judgement. A highly unusual delay occurred before the Privy Council judgement was released, arriving twelve days before the announcement that Britain would invade Iraq again. 171 Such timing would send a message to personnel soon to deploy. The interference went deeper still, with many court hearings being packed with MoD officials. 172 Such a sight cannot have failed to impress on the board the importance the Government attached to the case. Incidents such as this may explain the somewhat superficial analysis made by these Appellate Courts, leading to the inevitable conclusion that the judgments were the result of political interference. 173

However, such oblique interference is not the limit of the alleged interference. Coburn’s counsel stated that during the trial, the MoD ‘used every opportunity to hinder’. 174 Coburn is less circumspect, detailing both the official methods and alleged underhand tactics of the MoD. 175 The interference essentially fell into three categories: intimidation; ‘gagging’; and subornment. Intimidation took the form of threats of legal action against anyone who attempted to publish. Hodder & Staughton were suppressed swiftly by these means but Reed proved more resilient. 176 To ensure Reed’s cooperation the MoD arrived at their offices in large numbers armed with ‘affidavits... designed to impress upon Reed’s management that [Soldier Five was a] most serious breach of UK national security’. 177 Clearly such behaviour was designed to circumvent due process, applying pressure unavailable to the defence. Working in tandem with this, ‘gagging’ was imposed upon any parties coming into contact with the case. The MoD imposed confidentiality contracts upon legal representatives, preventing access to documents and effective communication between the defence team. 178 It was only after a defended application was made in the High Court that the defence gained access to the specifics of the MoD’s case. 179 Most serious perhaps is Coburn’s allegation that one expert witness was suborned. Dr Pugsley, a military historian and retired officer, was hired to determine exactly what was already in the public domain. 180 Pugsley apparently became ever harder to contact before it became

171 Templeton (n 75).
172 Templeton (n 75).
173 Further ammunition was provided when one the appeal judges turned out to be the father of one of the MoD’s lawyers, although they hotly denied any interference: Coburn (n 7) 305; T. Newton-Dunn, ‘MoD v SAS II’ The Mirror (London, 29 May 2001).
174 Templeton (n 75).
175 Coburn (n 7) 288-311.
176 Coburn (n 7) 291.
177 Coburn (n 7) 292.
178 Coburn (n 7) 294, 299-300, 301, 303.
179 [2001] BCL 87; Coburn (n 7) 303.
180 Coburn (n 7) 300-301.
known he had been appointed to teach at RMA Sandhurst. Coburn’s inference is that Pugsley was bought off although how accurate this is cannot be reliably assessed. Whilst such allegations cannot be proved, it is hard to see how Pugsley was qualified to teach the complex multi-disciplinary field of War Studies. If true, it cannot reasonably be equated with equity’s maxim of ‘clean hands’.

Nor indeed can the matter of duress. Whilst duress has been dealt with, along with it is submitted that there is an arguable difference between moral and legal duress. Duress in law is restricted to ensure that it is not used as an escape from an unwanted contract. Morally, however, duress is really a matter for conscience. In isolation, duress may not suffice to pass the threshold for ‘unclean hands’ but when taken with other similar factors, it may suffice. In this case, the duress must reasonably have affected the long-service soldier. Whilst it is not normal procedure to impose any specific characteristics, save age and mental capacity, on the reasonable man, it appears to be appropriate to impose service discipline on the reasonable man. Without this, it would be impossible to make a comparison, as the perception of military ‘direction’ by servicemen is vital to the interpretation of the imposition of the contract. The ‘direction’ to sign was not an order as failure to obey an order could result in a court martial whilst in this case, failure to sign would result in RTU. However, this technicality does not preclude Coburn from believing he had been ordered and placed under duress. Prior to promulgation, the contract was addressed in a speech by the Commanding Officer. The Commanding Officer stated that everyone must sign or leave. This was later confirmed in the form of a Regimental Order posted on the regimental notice board and would have been there once Coburn reported to the Adjutant. Coburn believed that his commanding officer expected everyone to sign without discussion. In essence, he believed he had received an order from a man whose suggestions would equate to compulsion. Is this then a reasonable belief that he had been ordered? While it is true that the possibility of leaving the regiment was mentioned, it appeared to be a sanction. Furthermore, as the announcement was written out as a Regimental Order and posted on the regimental notice board. Whilst the courts held that there was a choice it is submitted that every effort was made to ensure that it appeared to be an order, although all courts hearing the case held that there was a choice. The lack of clarity and openness practiced by the regiment further suggests unclean hands.

The final issue indicative of bad faith is the publication during the court case of Eye of the Storm. Ratcliffe, erstwhile RSM, provided a defence for the chain of command to Coburn’s allegations, blaming McNab. The MoD had no means of action against
Ratcliffe as his contract was unsigned.\textsuperscript{188} However, the MoD vetted the memoir while maintaining that Coburn’s version threatened national security.\textsuperscript{189} Such conduct is iniquitous and contradicts the MoD’s alleged ambition to prevent the further publication of SAS memoirs.

The confidentiality contract clearly involves a heavy inroad into an individual’s human rights and consequently can only be justified by conferring a great benefit upon society. Generally speaking, this case has been satisfied as clearly it is for the greater good that soldiers’ lives are not needlessly endangered for the benefit of the reading public. In addition, what will constitute a fatal breach of security is the purlieu of Government. However this clearly is not the case here. Almost every detail of the patrol was public knowledge before Coburn’s retirement. This level of knowledge, combined with Ratcliffe and Asher’s publication, ensured that debate would go on regardless. Furthermore, Phillips was still denigrated. Neither national security nor personal feelings would be protected by the imposition of the contract upon Coburn. Thus the moral case for the contract is not justified for Bravo Two Zero. The Court of Appeal apparently recognised this, constructing a justification to withhold an injunction.\textsuperscript{190} However, Radcliffe did not make any attempt in this respect to examine the MoD’s conduct. Rather justification was based on the limited nature of consideration and a general concern for freedom of speech.\textsuperscript{191} No further examination of the issue was made by the Privy Council as the MoD failed to lodge an appeal.\textsuperscript{192} It is submitted that more concrete justifications would have to follow the equitable maxim that ‘one who comes into equity must come with clean hands’. This well respected doctrine has been used throughout the common law world to ensure that claimants do not profit by unconscionable conduct. Notably in \textit{Riggs v Palmer}, it was used to prevent a murderer inheriting from his victim.\textsuperscript{193} Whilst not to be equated to murder, the MoD apparently applied immoral pressure to both Coburn and his representatives, suborned and obstructed the defence team and attempted to interfere with the Appellate Courts in both New Zealand and Britain. Simultaneously the MoD was assisting the publication of other books relating to the patrol. Given these facts, it is impossible conclude that the MoD had the requisite ‘clean hands’ to allow the operation of an equitable doctrine.

\section*{V – Conclusions}
Bravo Two Zero was part of a vital mission, which played a huge role in the Coalition’s ultimate victory. However for the five men who returned, the war has not ended, evolving into a war of words. The situation escalated with each disclosure and the MoD reacted by imposing a new, untried legal device - the confidentiality contract. As a contract, consideration was required to be valid but it was shown to be lacking in this case. The consideration offered took the form of a continued posting in UKSF. However, such consideration is meaningless as it places a common law obligation

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  \item \textsuperscript{188} \textit{Panorama} (n 2).
  \item \textsuperscript{189} Coburn (n 7) 292; [2001] BCL 87.
  \item \textsuperscript{190} [2002] 2 NZLR 91.
  \item \textsuperscript{191} [2002] 2 NZLR 91 [103].
  \item \textsuperscript{192} Templeton (n 75).
  \item \textsuperscript{193} \textit{Riggs v Palmer} (1889) 115 N.Y. 506.
\end{itemize}
above the Royal Prerogative governing the armed forces. Under the Royal Prerogative, a signatory could be posted at any time, including the moment of contracting. This principle rendered forbearance, which the MoD argued constituted valid consideration, entirely illusory and consequently gave no consideration for Coburn’s promise of lifelong silence. This was not, however, the finding of the Privy Council. The Privy Council based their findings on weighty authority, *Alliance Bank v Broom*, which had never been doubted in over a century and held that forbearance was good consideration. However, it is submitted in this article that the peculiar facts of this case and the nature of military service distinguish *Alliance Bank v Broom*. Furthermore, it is submitted that the alternative construction of the Privy Council relying upon *Williams v Roffey* is a more acceptable construction but is based upon oft doubted dicta and therefore lacks authority. Thus the confidentiality contracts at the heart of this case cannot be considered to be truly valid in law.

Even if the contracts were truly valid then they would have be void for lawful duress. That is, Coburn was subject to legitimate pressure amounting to compulsion that voids the contract. This pressure resulted from Coburn’s unique situation and the unique nature UKSF service. Coburn joined UKSF from NZSAS, having never served with his putative parent unit. He had no life in the United Kingdom outside UKSF, giving him less choice than other signatories. Furthermore, the particulars of SAS service belie the MoD’s definition of ‘RTU’ as mere reassignment. The effort required to pass selection combined with the disgrace of ‘RTU’ placed far more emotional pressure upon signatories than the Privy Council appreciated. It is not suggested that the Privy Council erred in interpreting the legitimacy of the pressure. The army had every right to post a soldier as they deemed appropriate. However, it is submitted that the Privy Council erred in their interpretation of the mores of SAS life and the effect of RTU upon the mind of those asked to sign. If correctly construed, it is submitted that the Privy Council would have found that Coburn was subject to a form of lawful duress.

Even if there was no duress in law, then it is submitted that moral duress was suffered by the signatories as a result of the manner in which the ‘order’ was promulgated. It has been demonstrated that the ‘reasonable soldier’ would construe the manner the contract was presented as an order, with the inevitable feelings of compulsion inherent in military life. This ‘order’ directly limited the signatory’s freedom of expression for life, an imposition justified to protect serving and former UKSF personnel. It is submitted that this utilitarian argument is not made out. Utilitarianism demands the greatest good for the greatest number. The MoD’s interpretation was that publication would reveal confidential information, thereby endangering lives. Furthermore, the families of the deceased would be harmed by revelations of past missions. However, whilst well founded in most situations involving UKSF, this was not the case of Bravo Two Zero. The tactics in the published memoirs were either demonstrably foolhardy or had not evolved since 1943. Consequently such revelations would not endanger UKSF personnel as they were already public knowledge. Furthermore, steps were taken by all to minimise potential dangers in their books, demonstrating other protections outside the contract. Without this inherent danger, the contract cannot be said to provide a tangible benefit, vitiating the utilitarian argument, by far the most emotive justification was the protection of the deceased families. This was particularly relevant to Bravo Two Zero, where Phillips’ reputation had been besmirched. However, by leaving the situation as it was, neither side would benefit, further undermining the MoD’s position. However, Coburn could have sought a right
to publish under the European Convention of Human Rights. The dictum of the European Court of Human Rights demonstrates that restraining Coburn’s freedom of expression was not proportionate to the needs of national security. However Coburn’s relief would be tempered by a need to account for profits. Justice would have been served but the effect would have remained the same.

This weakness was further compounded by the MoD’s conduct before the New Zealand courts. It is submitted that such conduct breaches the equitable doctrine that those who seek equity must do so with ‘clean hands’. It has been demonstrated that during the litigation, the MoD made every effort to hinder the defence and undermine the trial process by legal obstruction, political interference, intimidation of tribunals and subordination of witnesses. This behaviour to win an equitable injunction struck at the heart of equity. Combined with the apparent assistance supplied to Ratcliffe and Asher’s works, the MoD undermined their justifications for imposing the contract, suggesting the contract was little more than an expedient means of silencing unfavourable views. This proposition received further support by favouring contract over the Official Secrets Acts, one of the greatest anomalies in the case. The cases of Ponting, Wright, Tomlinson and Griffin’s indicate weaknesses in the act relating to jury trials and means of silencing, not punishing, those who disclose. Contract allowed the MoD to prevent publication without the hazards of a jury trial.

In imposing the confidentiality contract upon UKSF, the MoD made a gamble. They utilised an untested piece of law without the endorsement of Parliament to prevent the publication of memoirs with remedies unavailable under the Official Secrets Act. Coburn’s case represented the first challenge to the contract. It was a failure, whilst the MoD secured royalties but failed to prevent publication. The contract was upheld, although this was achieved by exerting considerable inequitable pressure. It has been demonstrated that the contract itself lacks true validity for want of consideration. Specifically it has been demonstrated that improper pressure was applied in Coburn’s case to obtain signature. There is a good case for choosing to apply contract law rather than the traditional, but equally flawed Official Secrets Act. However these advantages are outweighed by the inability of the MoD to supply genuine consideration without fettering the Royal Prerogative. It has been shown that the case for imposing such silence is by and large valid, a position endorsed recently by the High Court. However it is submitted that Bravo Two Zero should form a special case due to the exceptional level of prior disclosure. Without this, many of the justifications for limiting a soldier’s freedom of expression are invalid. If the contract had taken effect after Operation Granby, then this difficulty would have been avoided. Coburn’s case demonstrates the weaknesses inherent in the contract but also the weaknesses in the jurisprudential justifications for imposing such a contract - a decision wrong in law and morally unsound.
Abstract: This article serves as a discussion on the role of unconscionability in proprietary estoppel. This article uses critical observations, together with the aid of theoretical insights from academics, to form a critique of the problem in issue; the often unspoken role of unconscionability in the operation of the doctrine and its interaction with the more formulaic requirements of assurance and detrimental reliance. Consequently, to further debate, analysis will focus on the differing approaches of Lord Scott who enunciated the ‘clear and unequivocal’ test\(^2\) and Lord Walker who put forward the ‘clear enough’ test.\(^3\) The former approach employs a narrow analysis of proprietary estoppel, strict adherence to statutory formalities and places little emphasis on unconscionability. The latter purports the use of judicial discretion and contextual reasoning, attaching greater importance to the role of unconscionability. It will be argued that Lord Scott’s reasoning can explain the need for an adoption of a stricter requirements based proprietary estoppel and that over-reliance upon contextual grounds for an explanation of proprietary estoppel results in inconsistency and is a “recipe for confusion”.\(^4\)

I – Introduction

Unconscionability is introduced by Lord Neuberger’s comment that unconscionability “...is close to dishonourableness”,\(^5\) thus unconscionability of conduct can be described as pursuing a dishonourable course of action. In Cobbe v Yeoman’s Row Management\(^6\) both Lord Scott and Lord Walker disagreed with the Court of Appeal who were convinced by Cobbe’s claim of proprietary estoppel. Whilst doing so, both expressed their concern by what they observed to be an increase in the judicial reliance on subjective notions of ‘unconscionability’ in estoppel cases. Whilst seeking to guard against such notions, Lord Walker pointed out that proprietary estoppel “...is not a sort of joker...to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side”.\(^7\) However, as Goymour highlights, “...their respective methods for imposing a tighter framework on the doctrine differed”.\(^8\)

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1 The title is a tip of the hat to what the late Professor Peter Birk’s called unconscionability when regarded as a separate element; “a fifth wheel on the coach” found; P Birks and A Pretto (eds), *Breach of Trust* (Oxford University Press 2009) 226.

2 *Thorner v Major* [2009] 1 WLR 776 at 781.

3 ibid, 794.

4 A term first coined in relation to proprietary estoppel by Lord Scott in; *Cobbe v Yeoman’s Row Management* [2008] 1 WLR 1752, 1762.


6 [2008] 1 WLR 1752.

7 ibid 1774.

II – Lord Scott’s analysis of proprietary estoppel examined

In Cobbe, Lord Scott denied the existence of proprietary estoppel as an independent means by which a party can acquire a right.9 Instead, his Lordship characterised proprietary estoppel as a “sub-species of ‘promissory’ estoppel”.10 Lord Scott’s conclusion that unconscionability is not enough to engage the doctrine of proprietary estoppel is firmly based upon this characterisation, which has a simplifying effect.

Whilst emphasising the importance of the more formulaic requirements of assurance and detrimental reliance on said assurance, Lord Scott commented; “...if these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable”.11 Lord Scott’s purposive argument was a bold step that attempted to move away from the flexible analysis established by the Court of Appeal in Gillett v Holt12 and, in doing so, tried to curtail the reach of estoppel. It was due to the bold nature of this step that McFarlane and Robertson suggested that Lord Scott’s reasoning in Cobbe represented, “...the death of proprietary estoppel”.13 However, their dramatic ‘end of proprietary estoppel prediction’ was shortly thereafter disproved. Indeed, Thorner v Major14 gave fresh breath to proprietary estoppel, with Lord Walker himself rejecting their “rather apocalyptic”15 view of Cobbe.

Whilst agreeing with Lord Scott’s reasoning, Lord Neuberger posed the question, “...at least in a commercial context, what’s wrong with it [curtailing the reach of estoppel]?”16 This article adds this qualification, as it is this connection between commercial and domestic cases that comes into focus. It is argued that Lord Scott’s reasoning17 provides clarity and certainty to commercial dealings. This proposition corresponds with Lord Millett’s justified distaste for trust law poking its nose into commercial relationships.18 However, the wide-ranging remarks of Lord Scott, as Sloan suggests, “...could have serious implications for such domestic cases”.19 Typically commercial claimants know when an agreement is non-binding, which will preclude recourse to an estoppel claim, as addressed by Lord Walker.20 It is submitted that it is reasonable to deny such claimants estoppel rights. In support of this assertion and Lord Scott’s intention to narrow proprietary estoppel, Lord Neuberger pointed out that, “...it is not for the courts to go galumphing in, wielding some Denningesque

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9 Cobbe (n 6) 1761.
10 Cobbe (n 6) 1761.
11 Cobbe (n 6) 1769.
14 Thorner (n 2).
15 Thorner (n 2) 786.
16 Neuberger (n 5) 541.
17 Cobbe (n 6) 1762.
20 Cobbe (n 6) 1785.
sword of justice, to rescue a miscalculating property developer from the commercially unattractive actions of a property owner". 21 This, as a result, places a severe restriction on the operation of unconscionability, at least in the context of commercial dealings, and, with it, dilutes the overriding importance of unconscionability in an estoppel claim.

Lord Scott furthered his pronouncements on the position of unconscionability stating, “[A claim] cannot be sustained by reliance on unconscionable behaviour on the part of the representor”. 22 In doing so, Lord Scott endorsed the belief that unconscionability does not constitute an independent requirement, nor can it solely be the basis for a successful proprietary estoppel equity. Supporting this analysis, Lord Neuberger suggests that, “...unconscionable behaviour is not always enough to give rise to an estoppel”. 23 This viewpoint diametrically opposes the proposition that unconscionability is at the heart of the doctrine because, as Dixon observes, “...it denies the concept of any discernible meaning”. 24 However, it is rare for an estoppel to be rejected because there is no unconscionability, in terms of disallowing the claim ab initio rather than modifying the remedy. This is illustrated in Oakley v Airclear Environmental Limited 25 in which Etherton J allowed the appeal whilst finding no unconscionability of conduct. This supports Lord Scott’s assertion that the importance of establishing an estoppel claim rests on the three formulaic ingredients being present rather than a requirement of unconscionability.

In Thorner, Lord Scott sought to underline and develop his previous reasoning by enunciating that proprietary estoppel requires a ‘clear and unequivocal’ test, as espoused by the Court of Appeal, as, “...these elements would...always be necessary but might, in a particular case, not be sufficient”. 26 Instead, “...the representation or assurance would need to have been sufficiently clear and unequivocal”. 27 This reasoning resonates with Lord Scott’s characterisation of proprietary estoppel being a sub-species of promissory estoppel, 28 since this principle is thought to be a prerequisite for promissory estoppel. 29 As a result, this proposition inherently places less emphasis on unconscionability, whilst promoting the policy of certainty. Furthermore, analysis indicates that Lord Scott, in suggesting the analysis of proprietary estoppel in Cobbe can be universally applied, rationalised the operation of the doctrine.

Post-Thorner support for Lord Scott’s proposition can be found in Stallion v Albert Stallion Holdings Limited, 30 a case within the domestic sphere in which, Sarah Asplin

21 Neuberger (n 15) 541.
22 Cobbe (n 6) 1773.
23 Neuberger (n 15) 542.
25 WL 1819803.
26 Thorner (n 2) 781.
27 Thorner (n 2) 781.
28 Cobbe (n 6) 1761.
29 E Peel, Treitel on the Law of Contract (12th edn, Sweet & Maxwell 2007) para.3-144.
Q.C. in assessing the issue of proprietary estoppel framed the question as follows “...was the alleged representation created, clear and unequivocal?”\footnote{ibid, [129].} Thus Asplin Q.C. is disregarding the ‘clear enough’ test put forward by Lord Walker in Thorner, and instead, choosing to apply the test expressed by Lord Scott. Further support for Lord Scott’s test is found in MacDonald v Frost\footnote{[2009] WL 2958749.} in which, Geraldine Andrews Q.C. held in a domestic context, that the sisters’ claim failed because, “...there was no clear and unequivocal promise”.\footnote{ibid, [128].} Although not conclusive, these two post-Thorner cases go some way in demonstrating that Lord Scott’s proposition can be successfully utilised within domestic cases. It also indicates that, in the longer term, Lord Scott’s proposition may be a prudent step in providing much needed consistency in estoppel claims.

III – Lord Walker’s analysis of proprietary estoppel examined

In Cobbe Lord Walker offered a slightly different framework, requiring proof that, “...the claimant believed that the assurance on which he or she relied was binding and irrevocable”.\footnote{Cobbe (n 6) 1781.} Thus any attempt thereafter to revoke it by the representee is unconscionable. Lord Walker went onto further the view that unconscionability, “...plays a very important part in the doctrine of equitable estoppel...unifying and confirming...the other elements of proprietary estoppel”.\footnote{Cobbe (n 6) 1788.} This conflation between the elements of proprietary estoppel confirms that unconscionability does not have an independent existence, for it is purely defined in the other elements’ terms. However, the existence of unconscionability is a prominent feature of Lord Walker’s alternative approach, as his lordship further suggested that, “...if the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again”.\footnote{Cobbe (n 6) 1788.} Lord Walker, in choosing to shine the light on the elements of proprietary estoppel, whilst placing greater emphasis on unconscionability, confined the formality requirements to darkness. Certainty and clarity are key terms in the business world, their presence is incontrovertible. An estoppel claim should not extend to some sort of moral right, which is unenforceable in law. If judges suddenly introduced their views concerning the ethical acceptability of the behaviour of one of the parties it would promise no discernible benefit. Instead, this would actively militate against consistency, the inference being that confidence in the doctrine would diminish precipitously. Consequently, in Cobbe Lord Scott sought to reaffirm the importance of the formality requirements,\footnote{Cobbe (n 6) 1769.} with all but one of the other Law Lords agreeing with the speech of Lord Scott rather than Lord Walker. Lord Brown, delicately agreed with both Lords Scott and Walker.

In clarifying the impact of the decision in Cobbe Lord Walker attempted to ensure that worthy claimants are not excluded outside of the commercial context and seemingly made allowances for claimants in domestic cases. As Goymour argues,
“...it would have been difficult for anyone to argue that they truly believed an inter vivos testamentary promise was irrevocably binding”. 38 However, the court in Jennings v Rice39 allowed recovery in such circumstances. Lord Walker opined that the claimant in this case must be taken to have mistakenly believed that the promise was irrevocable.40 This may be an artificial analysis as no such specific findings of fact were ever made. Even after Lord Walker’s clarification in Cobbe, his Lordships judgment signified a radical departure from his previous position in Gillett in which, Lord Walker appeared to widen the ambit of proprietary estoppel, stating that, “...the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments”.41 This approach to proprietary estoppel left elements largely undefined, making the doctrine unpredictable. The corollary of this is that it creates the danger of a party using unconscionability as a smokescreen for their claim. It was thus essential to develop a new stricter approach to satisfying the equity, which on the whole Cobbe achieved.

In Thorner, Lord Walker chose to redefine his analysis of proprietary estoppel again. Lord Walker insisted that, for a successful claim, the assurance has to be ‘clear enough’, because what is sufficient is, “...hugely dependent on context”,42 drawing a broad distinction between a commercial and domestic sphere. The rationale behind this was to ensure that proprietary estoppel remained a flexible remedy, unbounded by technical limitations.43 This conclusion was supported by all of their Lordships who presided over this case, except for Lord Scott, which, in his view, cases such as Thorner where the assurance relates to an expectation of an interest in land should not be cases of proprietary estoppel but should be dealt with under the rubric of a remedial constructive trust,44 in light of Re Basham45. It is mystifying how the majority failed to be persuaded by Lord Scott’s elaborate and scholarly speech.46 To achieve consistency, it is important that the two remedies are separate. The judgment of Thorner has ensured that future cases are conducted against a backdrop of legal uncertainty, as an agreement of fundamental terms remains elusive. The emphasis on ‘context’ has widened the ambit so far is that it may encourage claimants to take a chance at court and pursue their unmeritorious claims. In Thorner, Lord Walker also firmly asserted that proprietary estoppel is not a sub-species of ‘promissory’ estoppel,47 creating further ambiguity in the classification of the doctrine. Lord Walker was however, adamant that Cobbe did not severely curtail the doctrine of proprietary estoppel.48

38 A Goymour (n 8) 39.
40 Cobbe (n 6) 1782.
41 Gillet (n 12) 225.
42 Thorner (n 2) 794.
43 M Dixon (n 24) 266.
44 Thorner (n 2) 785.
45 [1986] 1 WLR 1498.
46 Thorner (n 2) 780-6.
47 Thorner (n 2) 797.
48 Thorner (n 2) 787.
In Gill v Woodall\(^49\) James Allen Q.C. applied the test for representations that Lord Walker put forward in Thorner. In doing so, James Allen Q.C. referred to Lord Walker’s reasoning, stating, “...what amounts to sufficiently clear in a case of this kind is hugely dependent upon context”.\(^50\) In describing this ‘broad approach’, James Allen Q.C. emphasised the importance of unconscionability of conduct being present, further supporting Lord Walkers’s analysis that, “...the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine of proprietary estoppel”.\(^51\)

IV – A look to the future
The differing propositions of proprietary estoppel were tested at the Court of Appeal in Herbert v Doyle\(^52\). Arden L.J. after considering Lord Scott’s and Lord Walker’s respective analysis in both Cobbe and Thorner, chose to apply Lord Scott’s proposition. In doing so, commenting on the issue of unconscionability, Arden L.J. accepted that, “...the judge [Lord Scott] was most careful to apply the reasoning in Cobbe”.\(^53\) Morgan J. concluded, “...I find that there is nothing which suggests that the test for certainty is more strict than the test for certainty in the law of contract”.\(^54\) This conclusion corresponds with Lord Scott’s categorisation of proprietary estoppel being a sub-species of ‘promissory’ estoppel, defending its position from Lord Walker’s latent threat\(^55\) which contradicts the policy of certainty. Furthermore, from the post-Thorner cases considered, it appears that practice judges will continue to apply the ‘clear and unequivocal’ test, which further corrodes the importance of unconscionability. The alternative formula, ‘clear enough’, which Lord Walker himself admitted, “...is thoroughly question-begging”,\(^56\) has not yet overtaken the pre-existing test for proprietary estoppel, although it was used by James Allen Q.C. in Gill.

V – Conclusion
At its heart, the determination of the role and importance of unconscionability relies on which analysis of proprietary estoppel prevails. The battle lines have been drawn between Lord Scott’s proposition, which employs a strict adherence to statutory formalities, placing little emphasis on unconscionability, and Lord Walker’s analysis, which, on the other hand, purports the use of contextual reasoning and attaches greater importance to unconscionability. In an attempt to seek consistency there has been a concomitant move towards the former hand; Lord Scott’s narrow-based factors, illustrated in the post-Thorner cases cited.\(^57\) This essay adds to the morass of material on this issue, concluding in support of Lord Scott’s proposition. However, with the

\(^49\) [2009] WL 3643852.
\(^50\) ibid, [511].
\(^51\) ibid, [549].
\(^52\) [2010] WL 4039799.
\(^53\) ibid [78].
\(^54\) ibid [91].
\(^55\) Thorner (n 2) 797.
\(^56\) Thorner (n 2) 794.
proper reach of estoppel, and its relation to statutory formalities yet to be determined, there is still everything to play for.
SHOULD COMPANIES BE RUN PURELY TO SERVE THE INTERESTS OF SHAREHOLDERS?
Laura Allsop, University of York

In the 1930’s Berle and Means made two key observations about modern companies. The first was that shareholders were so numerous that no individual shareholder had an interest in attempting to control management. Secondly, that management were no longer solely accountable to shareholders as they exercised enormous autonomous and economic powers which had the potential to harm society.¹ They observed that a small group of managers had the power to build or destroy communities through the ability to create or remove productivity and wealth, thereby making directors the true distributors of wealth.² These findings sparked a debate between Adolph Berle and Merrick Dodd in the Harvard Law review over what is the proper purpose of public corporations in society.³

In order to ascertain whether companies should be run according to the theory of shareholder primacy, or stakeholder theory, each will be briefly outlined, before moving on to critically analyse and evaluate these two theories. The full scale of the theoretical debate is beyond the scope of this analysis, therefore the focus will instead be on three key areas which, in turn, will be used to evaluate these theories. The first section will suggest which of the two theories is stronger, based solely on the moral arguments for each. The second section reviews the impact that these theories have on the efficiency of a corporation and its ability to make profit. Finally the practicality of both of the theories will be assessed by considering the ease with which they could be implemented. The conclusion suggests that the very nature of modern corporations requires directors to adopt a managerial stance which is shaped by stakeholder theory. This will ensure that the corporation which they manage is ultimately successful.

I – An Introduction to the Theories
Berle argued for the theory of Shareholder Primacy. This theory suggests that corporations only exist as a vehicle to make money for their shareholders. Berle stated that corporations were made up of assets that were the private property of the shareholders alone.⁴ On this basis he contends that directors are the fiduciary agents of the company and therefore run the business on behalf of the shareholders with the sole interest of making money for those shareholders. Berle was of the belief that because companies are the private property of their shareholders, an action by the directors to fulfil anyone’s interests other than the shareholders’ would be a blatant breach of those shareholders’ property rights and would result in the directors being held in breach of trust.⁵ He was therefore a supporter of the aggregate theory which emphasises the real people behind the corporation, and holds that the individual’s

² ibid.
³ A Berle, ‘Corporate Powers as Powers in Trust’ (1931) 44 Harv L Rev 1049; M. Dodd, ‘For Whom are Corporate Managers Trustees?’ (1932) 45 Harv L Rev 1145.
⁴ ibid 1049.
⁵ ibid, 1049.
Should Companies Be Run Purely To Serve The Interests of Shareholders?

rights and obligations should be the corporation’s focus. This is because the corporation has no independent existence so everything should be explained by reference to its members. The aggregate theory is used to justify the primacy that company law gives to shareholders, as they are the key individuals behind the corporation.

In contrast, Dodd advocates a stakeholder theory of business management. He argues that public opinion has developed a law that not only supports and develops businesses, but also enables those businesses to be profitable for their owners. He believes that in order for a business to be successful it should be viewed as more than an economic institution; it also needs to be viewed as a social service which has a profit making function. This theory revolves around the idea that by considering the broader interests of stakeholders, rather than merely focussing on shareholders, jobs would be more secure thereby encouraging employees to create better quality products for consumers, which, in time, would lead to greater contributions to the welfare of the community as a whole.

II – Is Stakeholder Theory Morally Wrong?
The strongest argument put forward by those who advocate shareholder primacy is that the corporation is owned by the shareholders and therefore the directors have a duty to act in accordance with their best interests. This translates into making as much profit as possible. Berle was a strong believer of this idea stating that the modern corporation only exists to make its shareholders’ money. On this basis all the powers that are granted to directors are excisable only for the benefit of the shareholders. Directors are trustees of the company and therefore they are under a fiduciary duty to utilise their powers for the benefit of shareholders, excluding all others. The Shareholder Primacy theory was augmented by Milton Friedman who stated that shareholders are the owners of corporations and therefore shareholder’s social responsibility was to increase the corporation’s profit. The crux of the theory is based upon the idea that shareholders invest capital into the company which is used to purchase assets for the company. If this theory is correct it would give the shareholder property rights within the corporation. Framing share ownership in terms of ‘rights’ would, in accordance with Dworkin’s Rights thesis, give shareholders a primacy of rights over other considerations of general social welfare. The contrasting argument is that shareholders do not in fact own corporations, but instead they own a type of security in the corporation which is commonly known as shareholdings. The difference in the form of ownership is significant as it could limit the rights that a

7 M Dodd, ‘For Whom are Corporate Managers Trustees?’ (1932) 45 Harv L Rev 1145, 1150.
8 ibid 1148.
10 ibid 1189.
11 A Berle (n 3) 1060.
12 L Stout (n 9) 1189.
A shareholder has in relation to the corporation and their ability to be considered before other legitimate considerations, especially those concerning stakeholders.\textsuperscript{14}

The credibility of the latter argument is increased when the rights the shareholders have are examined in greater depth. Shareholders do not have the right to exercise control over the corporation’s assets, nor do they have the right to withdraw dividends from the corporation.\textsuperscript{15} Furthermore, any influence they have over the corporation is indirect and diluted down to being almost negligible.\textsuperscript{16} Directors are not servants who obey the directions of shareholders, instead directors have an element of discretion as to how they run the business and which considerations they take into account and act upon.\textsuperscript{17} There is a statutory duty for corporations to ‘promote the success of the company for the benefit of its members as a whole, and in doing so have regard to other interests’.\textsuperscript{18} This further suggests that shareholder interests may be overridden by what is perceived to be more important considerations.\textsuperscript{19} Such considerations tend to be utilitarian in outlook, such as attaining an optimum distribution of social benefits amongst all stakeholders and thereby enhancing overall distributive equity in the corporation.\textsuperscript{20} The Utilitarian outlook suggests that stakeholders should be entitled to share the benefits of the corporation as they have contributed to the corporation’s earnings. This creates a legitimate expectation that the corporation’s benefits should be used to serve the common good of stakeholders, as the stakeholders contributed to their creation, rather permitting them to be exclusive to shareholders.\textsuperscript{21}

There is also a moral argument which stems from the idea that an attempt to run companies for the benefit of anyone other than shareholders is a blatant breach of property rights and therefore it would be immoral for companies to run their businesses in this manner. In contrast it is arguable that as the size of corporations increase they have a greater power to harm society and therefore running a company is now a public profession rather than a private matter. Successful corporations cannot make decisions based on private considerations, such as what is best for the shareholders, as there is now an increased requirement of social responsibility which must also be addressed.\textsuperscript{22} Further to this, running a business with a focus on the short term goal of making profit for shareholders damages the reputation of the business, demotivates employees and therefore hinders the company’s ability to make profit in the long term.\textsuperscript{23} The moral argument for stakeholder theory is therefore much more

\textsuperscript{14} L. Stout (n 9) 1189.
\textsuperscript{15} Saloman v A Saloman and Co Ltd [1897] AC 22, 29; Macaura v Northern Assurance Co Ltd [1925] AC 619, 625.
\textsuperscript{16} Companies Act 2006 s.171; and Companies Act 2006, s.168.
\textsuperscript{17} Gramophone and Typewriter Ltd v Stanley [1908] 2 KB 89, 105.
\textsuperscript{18} Companies Act 2006, s.172.
\textsuperscript{21} A Keay, The Corporate Objective (Edward Elgar Publishing 2011) 135.
\textsuperscript{22} M Dodd (n 7) 1148.
\textsuperscript{23} See Maurer, ‘Corporate Governance as a failsafe mechanism against corporate crime’ (2007) 28 Comp Law 99.
compelling than that of shareholder primacy and it suggests that morally, modern corporations should be making the transition to having a corporate management based on stakeholder theory.

III – Is Stakeholder Theory Less Efficient?
Stakeholder theory is in many ways pro-shareholder, in that it encourages the managers to articulate their shared views on the purpose of the company and the sense of value they believe it should have.\(^24\) This enables managers to improve everyone’s circumstances. Managers must act in a way which inspires stakeholders by creating products and services that customers want to buy, offer jobs that employees want to fill, and build relationships with suppliers that companies are eager to have.\(^25\) The effect of this is to make the corporation’s employees feel more secure in their employment which allows them to perform their job with optimum efficiency. Employees may also feel more affluent, even if they are not, which will encourage those employees to spend more money through buying products both from their employer and other corporations.\(^26\) This is just one example of how stakeholders and shareholders can benefit. Therefore, the goal of stakeholder theory is not only to maximise profit, but to do so in such a way that provides benefits to all stakeholders, not just the corporation’s shareholders. This fits in with Rawls’ theory of fair play which states that in a scheme, such as a company, advantages depend on everyone co-operating, even if co-operation means that some parties must make sacrifices. The theory states that if every person co-operates so that there are no free riders then the profit will be maximised.\(^27\) If this were to be applied to company law, it would mean that no stakeholder group should be treated preferentially. Instead, they are all seen as stakeholders in the company, who make sacrifices and are under (often burdensome) obligations to that company. Consequently, they should all receive an equal amount of the benefits.\(^28\)

The stakeholder theory has been adopted by the German economy and legal system. In the 1990’s, the German economy was one of few economies to triumph over the recession. Japan has also incorporated stakeholder theory into both its economy and legal system and, at the time of writing, is one of the strongest economies.\(^29\) The stakeholder approach is therefore still in pursuit of economic objectives, as well as maximum efficiency but in such a way that recognises the stakeholders that exist behind the corporation.\(^30\)

\(^{25}\) ibid 366.
\(^{26}\) M Dodd (n 7) 1152.
\(^{30}\) A Dignam and J Lowry (n 6) 379.
Although economic examples have been used, Kahler notes that economies are not vastly different from corporations. Business organisations cannot exist in isolation from society, as the survival and success of a business depends upon its understanding of society. Corporations such as Google, Amazon, and AES all operate under a stakeholder style of management and thereby use techniques to update themselves on current societal views. An example of this is the way Amazon relies so heavily on customer’s feedback to highlight problems in the corporation and how they should be addressed. They also get customers to suggest products to other like-minded customers and then use these recommendations to create deals for customers, thereby making their products and prices more appropriate for the consumer without having to go through an inefficient trial and error process.

The fact that these corporations are managing to flourish in difficult economic times suggests that stakeholder theory is effective in business, and not as detrimental to profits as advocates of shareholder primacy suggest. The success of modern corporations depends upon their ability to recognise that they have a duty to society which is best fulfilled by acting on the duty owed to their stakeholders. The duty to society is often fulfilled through community schemes that businesses run, one example being the Robinson’s ‘Transform Your Patch’ scheme. For every bottle of Robinson Fruit squash that is bought, Robinsons donate money to develop community spaces such as parks, playgrounds and sports fields. There appears to be two social aims of this project. The first is to reduce the amount of youths on the street by providing them with a place to go and thereby attempting to reduce youth crime and gang culture. The second aim is to give youths somewhere they can undertake sport and stay fit thereby reducing the nation’s obesity. It has recently been released that Britvic (the owners of Robinsons) sales have risen by 7% highlighting how schemes to address social problems have the potential to attract more business.

A similar scheme was implemented by Sainsbury’s, the ‘Sainsbury’s Active Kids’ scheme. This is a scheme where vouchers are given to customers who spend over a certain amount in Sainsbury’s stores. These vouchers can be redeemed by either schools, or other accredited organisations for sports equipment. The scheme was set up to address the continued national debate surrounding physical activity in schools by inspiring pupils and teachers to get more active. This scheme is one of many factors that have enabled Sainsbury’s to enjoy a significant rise in sales that has

31 J Kaler, (n 19) 254.
afforded them the largest market share of all supermarkets in the UK. This highlights how co-operation with society is imperative if a corporation is to succeed in business, especially now that corporations have grown so large, and the shareholders have become so dispersed. From these examples it is evident that companies should not be run purely for the interests of shareholders, as this isolates business from the needs and wants of society, which in a tough economic climate may result in a company suffering financially.

A company which exemplifies stakeholder management is Cadbury’s, who in the past exhibited a long standing commitment to stakeholder well being. It not only ensured proper working conditions and wage levels, the founder, George Cadbury, also created Bournville village; a safe living environment for Cadbury workers. It was hoped that this would protect the workers from the evils of modern cramped living conditions that blighted England at the time. The consideration of stakeholders’ needs and interests helped to make this company successful, as the workers were healthier and more efficient than workers at most other UK corporations. In the long term, this made Cadbury more profitable. The reputation that Cadbury earned for having this style of management also facilitated its success as consumers could see that a proportion of the profits being made were going to community benefit rather than to what could be perceived as a money grabbing corporation. Cadbury is still known for its stakeholder approach to business, something which was feared would be under threat from the recent takeover by Kraft. An example of how Cadbury continues to look after its stakeholders interests was its shift to fair trade produce which ensures it maintains a good relationship with its suppliers. This also has the effect of making Cadbury appear more ethical which will enable employees to be proud to work for that corporation and perhaps work more efficiently. Cadbury has taken a further interest in protecting its stakeholders through its ‘Fit for Life’ Programme. This scheme seeks to ensure that employee’s health is maintained through the provision of numerous courses such as yoga, Pilates, and free health checkups. By ensuring staff are healthy and relaxed it reduces employee turnover and the amount of sick pay the company has to pay out each year, which contributes to Cadbury’s overall efficiency and profitability. Cadbury is an example of how a commitment to stakeholder theory can produce long term benefits for a corporation and its shareholders. It highlights how a corporation’s implementation of stakeholder theory can ensure that production is enhanced by avoiding bad relations with suppliers, unmotivated or sick staff. This provides yet further evidence that stakeholder theory is a more economically sound theory of management.

37 R Freeman, AC Wicks, B Parmar (n 24) 365.
38 R Philips (n 28) 112.
IV – Is Stakeholder Theory Too Complex to Implement?

The idea of a duty being owed to society arises from what is known as the realist theory, and is a theory that Dodd built upon in order to augment the stakeholder theory. Dodd set out a corporate realist model where the company is a real person and not just an aggregate of its members. Just as other real persons have citizenship responsibilities, a corporation has social responsibilities. He stated that if corporations were to enjoy the benefits of being a real person, such as limited liability and the corporation’s ability to own property, then the corporation is expected to exercise their powers in a manner which recognises the company’s social responsibility to employees, consumers and the general public. A key misinterpretation of this theory is that it advocates management should be responsible for and accountable to all non-shareholders. This view is incorrect as the term “stakeholders” only refers to people who are capable of causally interacting with the corporation in ways that can help or hinder its attainment of strategic objectives. The Companies Act 2006 gives an indication as to who is a stakeholder. It makes reference to employees, suppliers, local communities and customers, amongst others. S172 Companies Act 2006 therefore demonstrates the earlier point that stakeholders are those who are capable of casual interaction with the corporation.

Advocates of shareholder primacy state the remit of stakeholder theory is too broad to be effectively implemented by corporations. Kaler argues that it is impossible for directors to competently manage the numerous relationships that corporations have with stakeholders, without having their focus diverted from the aim of making profit, thereby undermining the economic function of corporations. Kaler believes that this will prevent companies from being creators of wealth, instead making them distributors of wealth. Further to this Sundaram and Inkpen state that even if corporations manage to weigh up the different interests in order to create a set of objectives that suit society and the corporation, the presence of multiple objectives will make governing the corporation difficult, if not impossible, ultimately leading to the corporation’s downfall. They therefore believe a corporation’s only objective should be to fulfil the shareholders’ interest of increasing the amount of profit made.

The above argument is strengthened when it is posited alongside the argument that shareholders are the residual claimants and risk bearers of corporations and so rightly expect to enjoy company benefits. Easterbrook and Fischel argue that contracts entered into by non-shareholder groups such as employees, managers, and creditors are explicit contracts and entitle non-shareholders to fixed payments such as salaries or interest payments. By contrast, they argue that shareholders have an implicit...

41 A Dignam and J Lowry (n 6) 378.
42 M Dodd (n 7) 1147-1156.
43 RA Buchholz & SB Rosenthal (n 32) 144.
44 Companies Act 2006 s.172.
45 J Kaler, (n 19) 254.
contract with the company which gives rights, entitlements and burdens after all of the company’s other obligations have been met. On this basis, Easterbrook and Fischel claim that in order to satisfy this implicit contract, companies should be run to maximise shareholder wealth.\textsuperscript{49} Sundaram and Inkpen also share this view stating that in the event of a breach of contract stakeholders can seek remedies through the legal system.\textsuperscript{50} They used this argument to state that the law protects stakeholder interests and ensures that companies consider them in their decision making. Sundaram and Inkpen thought that because contracts protected the interests of stakeholders then management should focus on running the company in the interests of shareholders.

It is not contested that the stakeholder approach is more complex than the approach of only serving shareholder interests, however the apparent difficulty in implementing it is contested. Advocates for the stakeholder approach state that the scope of interests to be considered for stakeholder theory is sufficiently narrow and clear to facilitate its implementation in modern corporations.\textsuperscript{51} Further to this the implementation of this type of management is key in modern corporations as business is increasingly about satisfying complex and competing demands.\textsuperscript{52} Dodd stated that business is permitted by the law primarily because it is a service to the community rather than purely a source of profit to its owners therefore it is imperative that the Directors take into account the interests and the needs of the company’s stakeholders.\textsuperscript{53} The aforementioned example of Cadbury highlights how it is not an impossible task for companies to ensure that stakeholder’s interests are taken into account. Cadbury’s decision to use fair-trade produce provides benefits to multiple stakeholders including producers, employees and customers. It also goes some way to addressing social problems through taking measures to ensure that poorer societies are not taken advantage of, thereby providing them with a means to develop. This demonstrates how a wide range of stakeholders may be factored into decisions without having a negative impact on the businesses success by unnecessarily impairing efficiency by converting wealth creation into wealth distribution.\textsuperscript{54} It also illustrates that stakeholder theory is possible to implement and sustain for a considerable amount of time.

Kaler feels that it has been greatly exaggerated the extent to which management will be distracted from the economic purpose of the corporation by having to determine which stakeholder interests should be taken into account. He states that whether or not management finds a stakeholder’s interest to be one which requires acknowledgement depends on the strength of the claim and how accountable the directors are to that stakeholder.\textsuperscript{55} In simple terms, management assesses whether there is a requirement for the interest to be acted upon. This links to the idea of key stakeholders having contracts with the corporation which will ensure that their interests are fulfilled.

\textsuperscript{49} ibid 37.
\textsuperscript{50} A Sundaram and A Inkpen (n 47) 350-363.
\textsuperscript{51} J Kaler (n 19) 257.
\textsuperscript{52} T Clarke, ‘The Stakeholder Corporation: A Business Philosophy for the information Age’ (1998) 31(2) Long Range Planning 189.
\textsuperscript{53} M Dodd (n 7) 1149.
\textsuperscript{54} J Kaler (n 19) 255.
through contractual performance. This means the identification of which stakeholder management are accountable to, and in which way, is a relatively simple task that will not distract them from the economic aims of the corporation. It also suggests that management will not be overwhelmed with responsibility for all bodies classed as non-shareholders.

Finally Donaldson and Preston state that whatever the ultimate aim of the corporation, managers must take account of the legitimate aims and interests of stakeholders who can have an effect on their business activities. This is supported by the idea that stakeholder theory provides the correct way to think about entrepreneurial risks as it forces management to consider the bigger picture of their actions which enables management to rationalise their decisions, thereby reducing the risk of them acting in a risky or unethical way. This is clearly of benefit to the shareholders, as well as stakeholders in general, as it means they are not associated with unethical and illegal behaviour which could affect their share price and ultimately the benefit that they receive from the corporation. Due to these arguments, it is clear that corporations should not limit themselves by concentrating exclusively on the interests of shareholders. A broader consideration of issues would keep the company in touch with the needs of society thereby increasing the ability of the corporation to create wealth for its shareholders.

V – Conclusion

Shareholders rights are weak. Their position is clearly more akin to a holder of a stake in a company as opposed to the owner of a corporation; this effectively puts them in no stronger position than stakeholders. The moral obligation that companies owe to society is therefore a much stronger argument than the moral obligation to abide by shareholders’ limited rights. Further to this the utilitarian concept of fair play to all actually increases efficiency of the corporation which ultimately helps all stakeholders, including shareholders, by increasing the amount of profit made. The economies of Germany and Japan, as well as companies such as Amazon, offer strong empirical evidence that companies who subscribe to a stakeholder model can match and exceed the efficiency of companies acting purely in the interests of shareholders. These examples also provide evidence that stakeholder theory, whilst being more complex, is a practical theory. The reservations about this theory based on a lack of practicality are therefore unfounded. These factors indicate that corporations should be managed according to stakeholder theory if they want to be successful and survive difficult economic times.

INTENTION: SUFFICIENT EXPLANATION FOR RESULTING TRUSTS OR INCONSISTENT WITH PRINCIPLE AND AUTHORITY?

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There are three traditional categories of resulting trust: those arising from a voluntary transfer that appears to be a gift but was not intended to be one, where the claimant paid wholly or in part for the rights conferred, and where an express trust failed “due to uncertainty, or perpetuity, or form”.

Lord Browne-Wilkinson in Westdeutsche developed a blanket explanation for resulting trusts, that unlike constructive trusts “a resulting trust is not imposed by law against the intentions of the trustee...but gives effect to his presumed intention”. This contested the decision in Vandervell where Megarry made a distinction between presumed and automatic resulting trusts – one giving effect to intention of the settlor, the other an automatic operation of law. Many argue that intention cannot explain the occurrence of all resulting trusts, particularly where they arise due to dispositive failure. However, it is also said that “the most widely held view is that all resulting trusts are based on the absence of any intention by the transferor to pass a beneficial interest to the transferee”, and one needs to clarify whether intention can be a sufficient explanation for resulting trusts, or whether other theories better explain their existence.

Lord Browne-Wilkinson’s first category in Westdeutsche is presumed resulting trusts, “where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B”. The resulting trust in this circumstance gives effect to the presumed intention that A did not intend to make a gift to B and therefore “the money or property is held on trust for A”. The emphasis on intention here is clear: resulting trusts will not give effect to intentions the settlor didn’t have – they can be rebutted by the presumption of advancement or by “direct evidence of A’s intention to make an outright transfer”. However, the presumption of advancement is rarely applied today since the modern age has rendered it outdated, and s199 Equality Act 2010 will abolish the doctrine when it comes into force, on such a day as the Lord Chancellor appoints unless the trust can be “rebutted by circumstances in evidence”. Although any rebuttal by

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2 Hodgson v Marks [1971] 1 Ch 892, 933 (Russell LJ).
4 Westdeutsche (n 3) 989-990.
5 Re Vandervell Trusts (No.2) [1974] 1 All ER 47.
6 Hanbury and Martin, Modern Equity (18th edn, Sweet and Maxwell 2008) 252.
7 Westdeutsche (n 3) 989.
8 ibid.
9 ibid.
11 Equality Act 2010, s216(2).
12 Dyer v Dyer (1788) 2 Cox 92, 93.
evidence is highly fact sensitive, a resulting trust will be presumed. However, where rebutting the presumption of advancement relies on an illegal purpose, a resulting trust will not occur. Robert Chambers criticises the view of a presumed intention that the settlor did not intend a gift and in fact intended a trust: “if the resulting trust was created by the presumed intention that it should exist, it could not properly be applied whenever that intention was impossible, improbable or unenforceable” – suggesting that Browne-Wilkinson’s theory contradicts trust principles.

William Swadling’s first criterion, the voluntary conveyance resulting trust, is an example of a presumed resulting trust arising from a voluntary transfer. Chambers argues that the ‘apparent gift’ “creates a presumption of resulting trust” due to the “provider’s lack of intention to benefit the recipient” and not a presumed intention to create a trust. Swadling strongly contests this view. He questions why equity is supposedly ‘suspicious’ of ‘apparent gifts’ and is not when gifts are post mortem or life estates. A trust is presumed if there is no contrary evidence, so Swadling argues that Chambers is incorrect in his thesis, particularly as the lack of intention to benefit the defendants “is once again a legal inference from facts proved by evidence, not the proof of an additional fact through the operation of a presumption”. Nick Piska criticises Swadling, arguing that “Swadling’s analysis may be accurate” but when analysed closely his argument does not support instances “where there is clear evidence that there was no declaration of trust, i.e. there is no evidential gap” because although he may claim that resulting trusts were wrongly applied in these circumstances, “it is the case law on which the analysis must be based”. This alludes that Browne-Wilkinson’s analysis is consistent with authority because Piska suggests that Swadling is wrong in criticising him and Swadling’s analysis itself is inconsistent with authority. The question that needs to be asked is whether presumed resulting trusts occur due to intent of transfer of property or whether they are a trust obligation imposed by law? Chambers answers this by saying that “the resulting trust is really both, because it is dependent on the provider’s intention, but not the intention to create a trust”, which can be supported by s53(1) of the Law of Property Act 1925 which exempts resulting trusts of land from having to be in writing – they arise by operation of law.

13 Fowkes v Pascoe [1875] LR 10 Ch App 343.
15 Robert Chambers, Resulting Trusts (Oxford University Press 1997) 34.
16 ibid 11.
17 ibid (n 15) 21.
18 Swadling (n 1) 87.
19 ibid 90.
21 ibid 449.
22 ibid.
23 Chambers (n 15) 33.
The most controversial area is Lord Browne-Wilkinson’s second category: “where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest”, referred to by Megarry as “automatic resulting trusts”. This is the critical point which Browne-Wilkinson and Megarry disagree on, Westdeutsche removing the distinctions made in Vandervell in favour of a single theory for all resulting trusts. In Vandervell, Megarry distinguished between the operation of presumed and dispositive failur resulting trusts, claiming that dispositive failure resulting trusts do “not depend on any intentions or presumptions, but is the automatic consequence of A’s failure to dispose of what is vested in him”. In contrast, Browne-Wilkinson did not distinguish between the two, submitting that they operated on the same basis of a presumed intention. This can be explained by the presumption when a trust fails being that the settlor would intend the rights to be held and not for the property to pass bona vacantia so a resulting trust occurs. Chambers favours this view: “where there is an express trust which fails to exhaust the trust property, the resulting trust is not the automatic consequence of that failure, but is dependent on the intention of the settlor”. However, Swadling argues against this because “an unexpressed intention is never enough to create a trust”. Supporting the statement above that Lord Browne-Wilkinson’s theory of intention goes against principle and authority, Justice Harman argued in Re Gillingham Bus Disaster Fund that in such cases, resulting trusts cannot “rest on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back: he has created a trust which so far as he can see will absorb the whole of it”. The fact that the settlor tried to create a trust does not support a theory that the settlor intended to recover the funds – he intended it to be on trust but not on trust for himself. Furthermore Lord Morris in Gissing v Gissing stated that “the court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had” – further evidence to support the view that Lord Browne-Wilkinson’s judgement goes against previous authority. Swadling strongly supports this view and agrees with Megarry’s judgement in Vandervell: when a resulting trust arises due to the failure of an express trust it has “nothing to do with proof by presumption of anything, least of all an intent by the settlor to create a trust for himself”. Lord Upjohn in Vandervell v IRC explains the trust as being ‘automatic’ because if A “fails to give it [the beneficial interest] away effectively to another or others or on charitable trusts it must remain in him”. Moreover, it can be

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24 Westdeutsche (n 3) 989.
25 Hanbury and Martin (n 6) 69.
26 ibid.
27 Chambers (n 15) 43.
28 Hanbury and Martin (n 6) 93.
29 Re Gillingham Bus Disaster Fund [1958] Ch 300.
30 ibid 310.
32 ibid 898.
33 Swadling (n 1) 99.
argued that Browne-Wilkinson was merely giving effect to previous authority; his theory may be inconsistent with Megarry’s in Vandervell, but as Chambers states, – “before Vandervell (No. 2), it was recognised that the resulting trust on the failure of an express trust was dependent on the intention of the settlor”.36 Therefore Browne-Wilkinson’s argument is not inconsistent with principle and authority if you look beyond Vandervell, Swadling arguing that Megarry’s “‘automatic’ resulting trust...defies legal analysis”.37

With regards to Quistclose38 trusts, it is arguable whether or not they are resulting trusts. Lord Wilberforce held there was a resulting trust in favour of Quistclose because the “intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear”,39 evidence that if Quistclose trusts are resulting then they are primarily based on intention. However, there are other views arguing that it is an express trust with two limbs, or that it is illusory40 and therefore this need not be explored further.

However, there is a further school of thought that “all resulting trusts effect restitution of what would otherwise be the unjust enrichment of the recipient”,41 explained by Chambers as being “equity’s active responses to non-voluntary transfer”.42 This does not have much support in the academic community. Swadling rejects this view, arguing that it is “unsustainable”43 for there to be a resulting trust in the majority of unjust enrichment cases, and Gary Watt also argues that “certainty of proprietary title will be undermined if current focus of law of trusts...is refocused on the reversal of unjust enrichment”.44 Therefore this is unlikely to have more support than Lord Browne-Wilkinson’s explanatory model of intention, especially as he himself rejected the unjust enrichment theory.

In conclusion, although Lord Browne-Wilkinson’s judgement in Westdeutsche is controversial, it is evident from the discussion that it is not completely inconsistent with principle and authority. Concerning his first category of resulting trusts, there is more agreement than disagreement – unless there is a special relationship or evidence to suggest otherwise, equity will give effect to the presumed intention of the settlor, that he did not intend a gift. The more controversial area is that of dispositive failure or automatic resulting trusts. It is not inconsistent with principle to presume that when a trust fails, the settlor intended someone to hold the rights, not for the assets to go bona vacantia to the Crown. In Westdeutsche the Lords did not apply a resulting trust on the facts because “it would be inconsistent with traditional principles of trust law.

35 ibid 313.
36 Chambers (n 15) 49.
37 Swadling (n 1) 102.
38 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.
39 ibid 582.
41 Chambers (n 15) 220.
42 ibid.
43 Swadling (n 1) 102.
44 Watt (n 40) 151.
to extend the availability of resulting trusts beyond the traditional cases to the circumstances arising in *Westdeutsche*”\(^45\) suggesting that Lord Browne-Wilkinson’s analysis is in line with authority. Although his views contradict that of Megarry in *Vandervell*, when concerning automatic resulting trusts before *Vandervell* the traditional theory of resulting trusts did rest on intention.\(^46\) Resulting trusts can be simply explained - “a resulting trust gives effect to a settlor’s...presumed intention in circumstances that were not anticipated by his expressed intentions”,\(^47\) which leads to the conclusion that Lord Browne-Wilkinson’s argument is not completely inconsistent with principle or authority, despite the criticism it received from many academics.


\(^{46}\) Chambers (n 15) 49.

\(^{47}\) Watt (n 40) 145.
A CRITICAL DISCUSSION OF THE RULE IN RE HASTINGS-BASS AND ITS SCOPE

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Although the rule has been described by one senior judicial commentator as a ‘magical morning-after pill for trustees suffering post-transaction remorse’, it is not a panacea for all fiscal ills.¹

The rule in Hastings-Bass² allows a court to set aside a trustees’ decision where unintended consequences have arisen. In this case the court refused to interfere because the trustee would still have been justified in acting as they did if the proper issues had been regarded. The courts are reluctant to interfere with discretionary decisions as it is the responsibility of the trustee, however, Buckley LJ indicates that a court can intervene within the original negative form of the rule.³ The courts should not intercede unless it is clear that they would not have acted as the trustee had. It is argued that the purpose of this rule is to protect both trustees and beneficiaries and in some instances third parties.⁴ The principle is an “easy way for trustees and...advisors to escape responsibility...of their negligent behaviour.”⁵ Alternatively, it would be inequitable if a trustee misapplies her powers and the result is that trust property is misappropriated. Therefore there needs to be a means for setting aside the misapplication of powers.⁶ Gordon describes the rule as a “get out of jail free card.”⁷

The rule was further developed in positive form⁸ whereby a court has a duty to intervene where the stated conditions are satisfied in that the trustee would reach a different conclusion when considering the relevant facts.⁹ Patten J presents questions as to what should have been considered and what would they have done if they had considered it.¹⁰ This will depend on the facts of the case, for example, failing to

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3 ibid 40, per Buckley LJ: “… a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he had achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.”
8 Mettoy Pensions Trustees v Evans [1990] 1 WLR 1587, per Warner J: “where a trustee acts under a discretion given to him under the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account consideration which he ought to have taken into account.”
9 ibid: “It is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did.”
taking into account fiscal consequences\textsuperscript{11} or the settlor’s wishes\textsuperscript{12} is likely to make a decision void. This permits a justifiable approach, however, it has been put forward that the rule is too wide and needs to be restricted: “the application of the principle is of potentially worrying breadth if it cannot be confined or controlled”.\textsuperscript{13}

It is clear that the rule can be described as a ‘morning after pill,’ however, Lightman.J attempted to set restrictions in \textit{Abacus v Barr}.\textsuperscript{14} Lightman.J suggested four prerequisites necessary to set a trust aside.\textsuperscript{15} There must be a breach of trust; a trustee must follow the correct procedure\textsuperscript{16} and take all relevant but no irrelevant factors into account.\textsuperscript{17} It was clear in \textit{Burrell}\textsuperscript{18} that the trustees had been in error though in \textit{Barr}\textsuperscript{19} the solicitor was at fault therefore the trustee was not in breach. This can be compared with \textit{Futter}\textsuperscript{20} in that power was exercised legitimately, yet the trust was set aside even though there was no breach. This is held that there does not need to be a breach\textsuperscript{21} and this removes the potential disparity when a beneficiary cannot prove a breach has occurred.

Secondly, should the decision of a trustee be void or voidable? If a decision is made voidable it allows the court to take into account various factors before nullifying a decision, whereas if it was void these considerations are ineffective. This would be a just approach as it brings in other equitable remedies such as rectification. For example \textit{Turner}\textsuperscript{22} failed to exercise a discretion however in \textit{Barr}\textsuperscript{23} discretion was exercised but the duty was not fulfilled therefore in this instance one is more serious.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Burrell v Burrell} [2005] EWHC 245.
\item \textit{Abacus Trust Company (Isle of Man) v Barr} [2003] 2 WLR 1362.
\item \textit{Sieff v Fox} [2005] EWHC 1312 (Ch), per Lloyd J.
\item \textit{Abacus} (n 11) per Lightman J: “In my view it is not sufficient to bring the rule into play that the trustee made a mistake or by reason of ignorance or a mistake did not take into account a relevant consideration or took into account an irrelevant consideration. What has to be established is that the trustee in making his decision has … failed to consider what he was under a duty to consider. If the trustee has, in accordance with his duty, identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect. … [T]he rule does not afford the right to the trustee or any beneficiary to have a decision declared invalid because a trustee’s decision was in some way mistaken or has unforeseen and unpalatable consequences.”
\item ibid: “1. Whether or not the trustees’ actions were sufficiently fundamental; 2. Whether the trustee had failed to consider something which he was duty-bound to consider and failed to act with sufficient diligence in identifying that necessary information; 3. Whether the trustee was at fault for failing to give effect to the settlor’s objectives; 4. Whether the exercise of the power was void or voidable.”
\item \textit{Hearn v Younger} [2002] WTLR 1317.
\item \textit{Edge v Pensions Ombudsman} [2000] Ch 602.
\item \textit{Burrell} (n 10).
\item \textit{Abacus} (n 11).
\item \textit{Futter and another v Futter and Others} [2010] STC 982.
\item \textit{Sieff} (n 12).
\item \textit{Turner v Turner} [1984] Ch 100.
\item \textit{Abacus} [2003] 2 WLR 1362.
\end{enumerate}
\end{footnotesize}
than the other and HMRC\textsuperscript{24} agrees that the latter should not be set aside. This would mean a decision could be “defeated on discretionary and equitable grounds...such as affirmation and laches.”\textsuperscript{25} This principle appears to be welcome and would reduce the circumstances where the rule can be invoked; however Norris.J\textsuperscript{26} renders the rule void so as to be consistent with previous cases.\textsuperscript{27}

Thirdly, the requirement as to whether a trustee ‘would’\textsuperscript{28} or ‘might’\textsuperscript{29} have acted differently has been controversial and it has been used under both terms. ‘Might’ presents a lower threshold enabling a decision to be changed easily, which is particularly important under pension trusts\textsuperscript{30} as consideration is provided under contracts of employment. ‘Might’ was applied in \textit{Kerr v Britch}\textsuperscript{31} and followed in \textit{Stannard v Fisons}\textsuperscript{32} whereas in \textit{AMP v Barker}\textsuperscript{33} and \textit{Hearn}\textsuperscript{34} either test would have sufficed on the facts. ‘Might’ would potentially open a floodgate therefore Lloyd.J stated under a discretionary trust a trustee must indicate he ‘would’ have acted differently while the ‘might’ test is subject to trustees under a duty to act, based on the balance of probabilities.\textsuperscript{35} There are numerous rules which seem to be perplexing and puzzling however, the definitive definition is within \textit{Sieff v Fox}\textsuperscript{36} as when a trustee is acting under discretion, and the effect is different from what was intended, the court will interfere.

The main reason that a trustee wishes to set aside a decision is for tax avoidance, it has been confirmed in \textit{Futter}\textsuperscript{37} that tax is an issue that must be taken into consideration. Previously HMRC has refused to be part of a case until \textit{Futter}\textsuperscript{38} where

\begin{itemize}
\item \textsuperscript{24} K Gordon and J Howard (n 7).
\item \textsuperscript{25} \textit{Sieff} (n 12).
\item \textsuperscript{26} \textit{Futter} (n 19) per Norris J.
\item \textsuperscript{27} \textit{AMP v Barker} [2001] PLR 77.
\item \textsuperscript{28} \textit{Betafence v Veys} [2006] EWHC 999 (Ch).
\item \textsuperscript{29} \textit{Kerr v British Leyland (Staff) Trustees Ltd} [2001] WTLR 1071.
\item \textsuperscript{30} J Hilliard (n 3): “Where beneficiaries are challenging a decision made by pension trustees to reject their claim, it seems proper that they can compel trustees to reconsider a decision made on incomplete evidence if the decision might be different once the evidence is complete. Beneficiaries may be regarded as having earned a legitimate reasonable expectation of this in the light of becoming settlor-beneficiaries by virtue of entering into a contract of employment with a company.”
\item \textsuperscript{31} \textit{Kerr} (n 28).
\item \textsuperscript{32} \textit{Stannard v Fisons Ltd} [1992] IRLR 27.
\item \textsuperscript{33} \textit{AMP} (n 26).
\item \textsuperscript{34} \textit{Hearn} (n 15).
\item \textsuperscript{35} \textit{Sieff} (n 12).
\item \textsuperscript{36} ibid, per Lloyd J: “Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.”
\item \textsuperscript{37} \textit{Futter} (n 19).
\item \textsuperscript{38} ibid.
\end{itemize}
it put forward its arguments as large amounts of tax were at stake. “The fact that there are further unanticipated consequences, such as an unexpected tax charge…is of no relevance.” Norris.J disagreed because the true state of affairs had not been looked at. In this case the trustee had considered consequences and taken advice therefore exercising their power validly; however, the tax analysis was incorrect. There should be a distinction where trustees fail to take into account tax consequences and where the advice turns out to be wrong. Where steps have been taken to achieve precisely the effect that was intended, why then should the trustee have the decision set aside as a fiscal consequence arises? It is “arguably inappropriate, the courts should choose to exercise their greatest vigilance in cases in which the outcome…will be to open the way for ‘improved’ tax avoidance.” Norris.J comments that tax consequences may not need to be taken into account, this will give the courts flexibility in what the trustee is expected to take into account.

The principle proves to be a huge benefit for trustees and allows them to make decisions in confidence “the principle seems to result in heads the trust wins, tails the Revenue loses” and it also allows their advisors to breathe a big sigh of relief as they are able to avoid negligence claims. It provides that a decision can be reversed due to a mere oversight and liability is escaped as trustees would have to suffer the loss. “So the principle protects beneficiaries…whose trustees are not merely improvident, badly advised, or missing something, but even where the trustees are entirely sensible and well advised, but…mistaken in what they understand or expect.” It will also mitigate the harshness of the rule where unfair consequences fall on someone who is blameless and putting limits upon it would narrow its application.

On the other hand, the rule is described as a ‘mess’, it creates great uncertainty and disobeys the primary requirements of any legal principle. The name can be disputed as Hastings-Bass was upheld and based on unintended breach. The rule that has been adopted is inconsistent and unclear as to what it applies to. It also seems to be unreasonable and deceitful; if money has been received from a trust and time has passed and it later transpires that the transaction is invalid, the money has to be paid back, this seems unwarranted and creates ambiguity. As presented above are the various factors that might be taken into account when applying the rule; however, it is still vague as to what should be considered. In some instances the decision is void.

39 K Gordon and J Howard (n 7).
42 Futter (n 19).
44 Target Holdings v Redferns [1996] 1 AC 421.
45 Lord Neuberger (n 42).
46 Pitt v Holt [2010] EWHC 45 (Ch).
47 Lord Neuberger (n 42).
48 ibid.
because of a failure to consider\textsuperscript{49} although in others the decision is not void despite failing to consider some important factor.\textsuperscript{50} Lastly, what factors are trustees’ obliged to take into account?\textsuperscript{51} There is a need to ensure Hastings-Bass is “not used simply when parties are mistaken...or have second thoughts.”\textsuperscript{52}

The Hastings-Bass rule is based on pragmatism and economic efficiency.\textsuperscript{53} It can be said to be a morning after pill because it permits a decision to be invalidated, “[i]t grants a second bite of the cherry to trustees who have erroneously caused the beneficiaries to suffer a liability to tax.”\textsuperscript{54} However it is not a cure because it only has the effect of protecting trustees and is only applicable in relation to fiduciary powers\textsuperscript{55}, it does not apply to gifts,\textsuperscript{56} nor will it protect settlors of private trusts or employers who establish a pension-scheme plan\textsuperscript{57}. If a power is applied correctly it is not likely to be set aside despite a mistake being made.\textsuperscript{58} Whilst the rule gives added protection for trustees, it appears that there are few limits in place and the rule needs to be ‘reined in’\textsuperscript{59}, the principle is still being developed and the courts have been trying to determine its limits since the 1975 case, adding to the ambiguity of the rule, although a rigid test may impose intolerable burdens on trustees who often undertake heavy responsibilities for no financial rewards. “The rule is being abused by big-fish tax avoiders who wish to avoid being taxed like the rest of us when their tax planning goes upstream.”\textsuperscript{60}

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\footnotesize
\textsuperscript{49} \textit{Green v Cobham} [2002] STC 820.
\textsuperscript{50} \textit{Breadner v Granville-Grossman} [2001] Ch 523.
\textsuperscript{51} K Gordon and J Howard (n 7).
\textsuperscript{52} \textit{AMP} (n 26) per Lawrence Collins J.
\textsuperscript{53} G Watt (n 40).
\textsuperscript{54} A Hudson (n 5).
\textsuperscript{55} K Gordon and J Howard (n 7).
\textsuperscript{56} \textit{Sieff} (n 12).
\textsuperscript{57} J Hilliard (n 3).
\textsuperscript{58} \textit{Re Vestey’s Settlement} [1951] Ch 209, 221: ‘Then a result is produced substantially or essentially different from that which was intended’.
\textsuperscript{59} C Mitchell (n 4).
\textsuperscript{60} K Gordon and J Howard (n 6).
\end{flushright}
CASE NOTES

CASE NOTE – JIVRAJ V HASHWANI [2011] UKSC 40
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In Jivraj v Hashwani\(^1\) the UK Supreme Court examined an arbitration clause in the contract between the parties, which required the appointed arbitrators to be members of the Ismaili community. It was held that such a clause would not amount to discrimination on grounds of religion or belief, since arbitrators were independent providers of services and the relevant equality law did not apply to them. This ruling can be interpreted in two ways. Its narrow reading concerns mostly the arbitration industry, as it establishes that arbitrators do not have the legal status of employees. On a wider view, the case restricts the scope of discrimination law in employment by placing the self-employed outside of the law’s protection.

I – The Facts
The facts of the case go back to 1981, when Mr Hashwani (the claimant) and Mr Jivraj (the defendant) embarked upon a joint venture to advance property investments. Article 8 of the joint venture agreement contained a clause requiring any disputes between the parties to be referred to arbitration. This provision (henceforth referred to as “the Clause”) read as follows:

"(1) If any dispute difference or question shall at any time hereafter arise between the investors with respect to the construction of this agreement or concerning anything herein contained or arising out of this agreement or as to the rights liabilities or duties of the investors or either of them or arising out of (without limitation) any of the businesses or activities of the joint venture herein agreed the same (subject to sub-clause 8(5) below) shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.

(2) The arbitration shall take place in London and the arbitrators' award shall be final and binding on both parties.\(^2\)

Thus, an arbitration panel was to be composed of three arbitrators, including one appointed by each of the parties, all of whom needed to be respected members of the Ismaili community (Shia Imami Ismaili Muslims), to which both Mr Jivraj and Mr Hashwani also belonged. It is worth noting that according to Article 9 of the joint venture agreement, any disputes were to be governed by English law, not the Ismaili rules.

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\(^1\) [2011] 1 WLR 1872.
\(^2\) ibid [2].
Successful throughout the 1980s, the joint venture was terminated by agreement in 1988. On 30 October 1988 a conciliation panel was appointed to divide the assets and, as required by the Clause, its three members all belonged to the Ismaili community. Since it was unable to resolve all the matters in dispute, the parties agreed to refer the remaining points to a single Ismaili arbitrator. He worked on them until 1995, leaving unresolved Hashwani's claim for payment and Jivraj's claim in tax liabilities.

In 2008 Hashwani through his solicitors claimed the payment due to him from Jivraj, calling on the defendant to appoint his arbitrator in pursuance of the Clause. The same letter contained a name of the claimant's appointee, who turned out not to be a member of the Ismaili community. Non-compliance with the Clause was justified on the basis that honouring the provision would now amount to a violation of the Human Rights Act 1998 which prohibits religious discrimination. Jivraj nevertheless contested the claimant's choice of arbitrator. Hashwani, in turn, applied for an order confirming his appointment under section 18(2) of the Arbitration Act 1996, which allows such application to the court in the absence of an agreed procedure on failure of appointment. The claimant also invoked The Employment Equality (Religion or Belief) Regulations 2003 as justification for his appointment.

II – The Law

The only legal instruments relevant on appeal were the EU Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, and The Employment Equality (Religion or Belief) Regulations 2003 which were enacted to implement that Directive.

As regards the 2003 Regulations, regulation 3, headed “Discrimination on grounds of religion or belief”, defined discrimination as treating someone less favourably than one treats or would treat other persons. Regulation 6 provides that “(1) It is unlawful for an employer … to discriminate against a person …(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;… or (c) by refusing to offer a person employment.” Employment means “employment under a contract of service or of apprenticeship or a contract personally to do any work” (regulation 2(3)). Finally, the prohibition of discrimination was subject to the genuine occupational requirement exception, as stated in reg. 7: “This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out (a) being of a particular religion or belief is a genuine and determining occupational requirement; (b) it is proportionate to apply that requirement in the particular case …” (reg. 7(2)) or where “an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out (a) being of a particular religion or belief is a

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3 Arbitration Act 1996, s.18(1)-(2).
5 The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1661), reg 3(1).
6 ibid reg 6(1).
7 ibid reg 2(3).
genuine occupational requirement for the job; (b) it is proportionate to apply that requirement in the particular case …” (reg. 7(3)).

For the present purposes, it will suffice to mention article 3 of the 2000 Directive, which defines the scope of its application. Accordingly, the Directive should apply to, inter alia, “conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”. A few issues need to be addressed before examining the judgments in the case. As noted by both the Court of Appeal and the Supreme Court, the scope of the Directive is wider than that of the Regulations. The former deals with religious, disability, age and sexual orientation discrimination, while the latter focused on religion or belief specifically. This was explained by the UK legislation having already covered other grounds referred to in the Directive. Furthermore, both Courts also agreed that the Regulations should be interpreted as “complementing all the other legislation prohibiting discrimination”, since all the provisions use similar language and terminology. Nowhere in the judgment was it noted that the Regulations are silent on the issue of access to self-employment, expressly required by the Directive.

It should also be noted that the Regulations have now been repealed by s. 211 and Schedule 27 (Part 2) of the Equality Act 2010. Although the Act represents the current state of the law, nothing in the Supreme Court’s judgment suggests a different outcome under the new legislative framework.

III – The Judgment of the Commercial Court

Faced with the question of the Clause’s validity, David Steel J ruled for the defendant. It was held that there was no discrimination on any of the submitted grounds (2003 Regulations, Human Rights Act 1998, public policy). Regarding the 2003 Regulations specifically, the judge did not consider arbitrators to be employees for the purposes of regulation 6. In any case, membership of the Ismaili community amounted to a genuine occupational requirement under regulation 7(3). The Clause should therefore apply between the parties to the dispute. Lastly, the religious requirement was not severable from the arbitration provision, which meant that the whole clause would be void without it.

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8 ibid reg 7(2)-(3).
10 Jivraj (n 1)[10].
12 Jivraj (n 1) [11].
14 ibid [28].
15 ibid [75]-[77].

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IV – Court of Appeal’s Ruling and the Subsequent Controversy
The Court of Appeal took a different view of the law and overturned the judgment of Steel J. Moore-Bick LJ, Aikens LJ and Sir Richard Buxton unanimously decided that (a) the appointment of an arbitrator involved a contract for services which falls under the definition of “a contract personally to do any work” and thus constitutes “employment” as stated in the Regulations. It was also held that (b) the genuine occupational requirement exception could not assist Mr Jivraj in the present case. The disputes were to be governed by English law and being a member of the Ismaili community is not necessary to perform the arbitrator’s function. On the issue of severance, it was found that (c) removing the discriminatory clause would render the whole agreement substantially different and therefore it should be void in its entirety.

The implications of Court of Appeal’s ruling to the arbitration profession were evidenced by the mere fact that the London Court of International Arbitration joined the proceedings and was separately represented in the Supreme Court. It was argued that the ruling jeopardised the standard practices in the industry, since clauses referring to arbitrators' ethnic or religious background are increasingly common. For example, a requirement for an arbitrator to be neutral to both parties necessarily carries with itself a nationality clause (i.e. an exclusion of arbitrators who share the nationality of any of the parties). If such clauses were held unlawful, it was submitted London’s reputation as the arbitration capital of Europe would be tarnished. A broader objection was also raised, namely that one of the main reasons for arbitrating instead of litigating is the ability of the parties to choose the decision-maker. The parties can appoint someone who is familiar with their cultural values and shares their perspective. With the parties’ confidence in the arbitration process threatened, no wonder that commentators from the arbitrators' side warned against a “minefield of complications”.

V – The Supreme Court
The worries outlined above were eased after the Supreme Court delivered its judgment on 27 July 2011. Lord Clarke of Stone-cum-Ebony JSC (with whom Lord Phillips, Lord Walker and Lord Dyson agreed) delivered the leading speech. Lord Mance JSC delivered a separate speech, agreeing with Lord Clarke and focusing on the peculiar nature of the arbitrators' profession. Lord Clarke addressed the issue of employment and the genuine occupational requirement, each of which will now be separately examined. Due to the Court’s findings in these two respects, the issue of severance did not arise.

\[16\] Jivraj v Hashwani [2010] I CLC 1057.
\[17\] ibid [25].
\[18\] Employment Equality Regulations 2003 (n 6).
\[19\] Jivraj (n 17) [27]-[29].
\[20\] ibid [34].
\[22\] Jivraj (n 1).
**V(a) – Are arbitrators employees for the purposes of the 2003 Regulations?**

In answering the key question as to whether a contract between the parties and the arbitrator provides for “employment under … a contract personally to do any work”, emphasis was placed on the word “under”. This led His Lordship to ultimately decide that “the role of an arbitrator is not naturally described as employment under a contract personally to do work. That is because his role is not naturally described as one of employment at all”.\(^{23}\) The Court rightly noted its obligation to as far as possible interpret the Regulations in light of the Directive's purpose.\(^{24}\) Consequently, the jurisprudence of the European Court of Justice (ECJ) was considered. Lord Clarke relied in particular on two cases – *Allonby v Accrington and Ressendale College* and *Lawrie-Blum v Land Baden-Württemberg*.\(^{25}\) In *Lawrie-Blum* the ECJ defined “worker” as someone who “performs services for and under the direction of another”.\(^{26}\) In *Allonby* a distinction was made between workers and independent suppliers of services in the context of equal pay. In the absence of any domestic authority to the contrary, His Lordship found “no reason why the same distinction should not be drawn for the purposes of the 2003 Regulations”.\(^{27}\) Applying the principles to the facts before the Court, His Lordship concluded that arbitrators are not subject to the Regulations as they are not subordinate to the parties with whom they contract for provision of services.

**V(b) – Does the genuine occupational requirement exception apply?**

In light of the above-mentioned finding, there was no practical significance to this issue. Nevertheless, Lord Clarke dismissed the claimant's argument that a dispute under English law does not require an Ismaili arbitrator as adopting “a very narrow view on the function of arbitration proceedings”, thereby aligning with the expectations of the arbitration industry.\(^{28}\)

**VI – Concluding Remarks**

In the eyes of the Supreme Court, the practical worries voiced by the thriving arbitration industry prevailed. With a sigh of relief from the arbitration community came a rather “surprising conclusion” that in the view of the Supreme Court, the European Union law allows for discrimination on grounds of religion or belief, disability, age or sexual orientation.\(^{29}\) This result should logically extend beyond the arbitration industry, since the broad purpose of the 2003 Regulations was to implement the Directive which dealt with all of the mentioned prohibited grounds. Such an outcome is even more bizarre when contrasted with articles 18 and 19 of the

\(^{23}\) *Jivraj* (n 1) [23].

\(^{24}\) As expressed by the European Court of Justice in Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

\(^{25}\) Case C-256/01 *Allonby v Accrington and Ressendale College* [2004] ICR 1328; Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1987] ICR 483.

\(^{26}\) *Lawrie-Blum* (n 18) [17].

\(^{27}\) *Jivraj* (n 1) [27].

\(^{28}\) ibid [60].

Treaty on the Functioning of the European Union (TFEU) which embody a general prohibition of discrimination. What is more, the Court's analysis equates “employment” with “occupation”. It was noted above that the Directive refers to both concepts separately and it is submitted that “occupation” is wide enough to include self-employment. Finally, it can be argued that the Supreme Court should have referred the case to the ECJ pursuant to article 267 TFEU. Lord Clarke, however, proclaimed the matter acte clair and did not make a reference in the absence of any reasonable doubt as to the application of the community law. 30

Whatever one's opinion on the result in Jivraj v Hashwani, there can be no doubt that the decision will have a profound impact on the personal scope of application of equality laws in the context of employment.

30 Jivraj (n 1) [73].
This case was decided at The Supreme Court before Lord Phillips (President), Lord Walker, Lady Hale, Lord Collins and Lord Wilson. Counsel for the appellant (Mr Smith) was Mr Tim Barnes QC and Sean Sullivan, while counsel for the respondent (the Crown) was Aftab Jafferjee QC and Duncan Penny. The judgment was delivered by President of the court Lord Phillips on the 20th July 2011.

I – Introduction
There are two types of indeterminate sentence: life imprisonment and imprisonment for public protection (“IPP”)\(^1\). Section 225 (3) Criminal Justice Act 2003, as amended by s13 Criminal Justice and Immigration Act 2008, allows a judge to pass a sentence of IPP if the defendant has been convicted of a serious offence where he finds there is a significant risk he will commit further offences harming members of the public.

The question in this case was whether a judge can, or should, impose a sentence of IPP on a defendant who is already serving a sentence of life imprisonment, under which he will not be released until he can satisfy the Parole Board that he is longer a danger to the public.

The test for the Parole Board is whether they are satisfied that it is no longer necessary for the protection of the public that the prisoner should no longer be confined, see s28 (6) (b) of the Crime (Sentences) Act 1997 as amended by s230 Criminal Justice Act 2003. This test is the same for both a sentence of life imprisonment and IPP.

For ease of reference below is s225 Criminal Justice Act 2003:

(1) This section applies where—

(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and

(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(2) If—

(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,

the court must impose a sentence of imprisonment for life.

(3) In a case not falling within subsection (2), the court may impose a sentence of imprisonment for public protection if the condition in subsection (3A) or the condition in subsection (3B) is met.

\(^1\) \textit{R v Smith [2011] UKSC 37.}
(3A) the condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.

(3B) the condition in this subsection is that the notional minimum term is at least two years².

The word “may” has been emphasised as this was for substituted for “must” by the Criminal Justice and Immigration Act 2008.

II – Facts
The appellant was born on 25th February 1950 and has been described as a ‘career criminal’, spending large periods of his adult life in prison, having a number of relatively recent convictions³. On 24th January 2000 the appellant was sentenced to imprisonment for life for attempted robbery and having a firearm with intent; a minimum term of four years to be served.

After serving this minimum term, the Parole Board was persuaded that he should be released on licence. On 11th January 2008 he was arrested on suspicion of committing eight armed robberies, with this arrest resulting in his recall under life sentence for the breach of the terms of his licence. He pleaded guilty to the eight charges⁴. The appellant was sentenced by His Honour Judge Greenwood to IPP.

III – Appellant’s Case
The appellant’s grounds of appeal were submitted on an alternative basis. Primary submission was that the IPP sentence was unlawful as s225 Criminal Justice Act 2003 was not satisfied, namely because the appellant had been recalled under his life sentence and therefore there would not be a significant risk to members of the public, as is required by s225 (1) (b).

In the alternative, it was submitted that His Honour Judge Greenwood erred in principle in imposing an IPP, as Parliament had conferred discretion on the judiciary by passing the Criminal Justice and Terrorism Act 2008. It was argued that although the statutory requirements for IPP were fulfilled, it was wrong to impose it⁵.

IV – Court of Appeal
When this case was heard before the Court of Appeal counsel representing the appellant did not submit that it was unlawful – merely wrong in principle. However, this argument was rejected by Maurice Kay LJ⁶.

V – Primary Submission: Lawfulness
The Court of Appeal’s decision was appealed, subsequently coming before the Supreme Court. Lord Phillips, delivering the judgment of the court, acknowledged that s34 Crime (Amendments) Act 1997 expressly states that it is acceptable to pass

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² Criminal Justice Act, s225.
³ R v Smith (n 1) para 4.
⁴ R v Smith (n 1) para 5.
⁵ R v Smith (n 1) para 10.
two indeterminate sentences on a defendant. Mr Jafferjee QC for the Crown referred to a passage by Thomas LJ in *R v Delucca* where he refers to the earlier case *R v O’Brien (Practice Note)* where there is approval of the practice of imposing two concurrent sentences of IPP on a defendant.

Mr Barnes submits that s225 (1) (b) Criminal Justice Act 2003 requires the judge to consider whether the defendant will pose a significant threat once he has served his sentence. However, Lord Phillips says this places an unrealistic burden on a sentencing judge and that s225 (1) (b) does not require such an exercise. The question must be answered on the premise that the defendant is at large. It is for these reasons that the primary case brought on the behalf of the defendant was dismissed.

VI – Alternative Submission: Discretion

It was originally claimed that the IPP sentence on top of the life sentence would have adverse procedural consequences due to a conflict, or overlap, of the Parole Board’s review requirements. However, Mr Barnes now accepts there is no such conflict or overlap.

It was put forward that as a matter of good sentencing practice the IPP should not have been passed, as it achieved no additional benefit. Lord Phillips expresses his sympathy with this submission but refused to condemn the decision.

For these reasons the appeal was dismissed.

VII – Analysis

The result passed by the Supreme Court appears to be the appropriate course of action to take. By referring to s34 Crime (Amendments) Act 1997 Lord Phillips instantly dismisses any uncertainty concerning the legality of the sentencing of two concurrent sentences. Also, if the appellant’s primary submission was accepted this would place an extremely difficult task on the judiciary as they would have to effectively look into the future to predict if the defendant would be of any threat to the public in cases such as this. Surely Parliament did not wish for that particular burden to be placed upon the judiciary.

However, Mr Barnes appeared to have a genuine point in relation to sentencing practice. From a subjective point of view, one may be of the opinion that it would be illogical to pass two sentences of top of each other. Despite winning the court’s sympathy, this was ultimately not accepted.

The decision by the Supreme Court does not change the law and appears to reflect cases that have gone before, as illustrated by the reference to *R v Delucca* and *R v O’Brien (Practice Note)*. The rationale behind the court’s decision is set out in admirable clarity by the President of the court, Lord Phillips.

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8 *R v O’Brien (Practice Note)* [2007] 1 WLR 833.
9 *R v Smith* (n 1) para 15.
10 *R v Smith* (n 1) para 17.
I – Facts
The case concerned corporate tax reform in Gibraltar. The dispute examined whether or not the corporate tax reform proposed by the Government of Gibraltar and the United Kingdom was in compliance with the EU State aid rules. The reform proposal was triggered by an investigation of the Commission into the then applicable tax regime in Gibraltar. At that time, three different corporate tax rates were applicable to Gibraltarian companies. First, 35% was the standard tax rate on profit, secondly a rate between 2% and 10% applied to the companies registered as a qualified company, and lastly the companies registered as an exempt company were subject to a fixed annual tax of between GBP 225 and GBP 300.1 The Commission claimed that the last two rates were tantamount to State aid and consequently initiated the formal investigation procedure on the basis of Article 87 TEC (now Article 107 TFEU).

In 2002, without prejudice to the aforementioned investigation, the Government of Gibraltar announced its intention to introduce an entirely new corporate tax regime for all companies in Gibraltar by repealing all the existing Gibraltarian corporate tax laws. Unlike the then existing rules, the proposal did not impose different tax rates on different types of companies; instead it consisted of a payroll tax, a business property occupation tax and a registration fee which was to be applicable to all companies in Gibraltar. The proposal set out was as follows:

a) **payroll tax**: all Gibraltar companies will be subject to a payroll tax in the amount of GBP 3000 per employee each year;

b) **business property occupation tax (BPOT)**: all companies occupying property in Gibraltar for business purposes will have to pay a tax on the occupation of that property; it is worth noting that liability to payroll tax together with BPOT was to be capped at 15% of profits which meant in effect no profit no tax;

c) **Registration fee**: all Gibraltar companies will have to pay an annual registration fee of between GBP 150 and GBP 300 per annum.2

Although the proposed legislation uniformly applied to all companies in principle, companies providing financial services and utility companies were to be subject to “taxation of designated activities” in addition to the aforementioned taxes. Utility

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1 The main difference between exempt and qualifying companies is that exempt companies were not actually present in Gibraltar while qualifying companies had a bricks and mortar presence there and were actively involved in various sectors. In other words, the former is incorporated solely on paper. Exempt companies could not carry on any trade or business in Gibraltar, that is why they were subject to lower rates of taxation. On the other hand, qualifying companies were able to carry on certain businesses with relatively higher burden of taxation.

companies were to bear a higher burden of tax at the existing rate of 35% of profits\textsuperscript{3} whereas financial services companies were to be subject to a tax rate of between 4% and 6% of profits.\textsuperscript{4}

By letter of 12 August 2002, the United Kingdom notified the Commission, pursuant to Article 88(3) TEC (now Article 108/3 TFEU), of the Government of Gibraltar’s reform of corporate tax.\textsuperscript{5}

\section*{II – Decision of the Commission}
The Commission initiated a formal investigation on the basis of Article 87 TEC (now Article 107 TFEU) into the new tax proposal and received comments from the United Kingdom and other interested parties, most importantly from the Government of Gibraltar and the Kingdom of Spain. As a result, the Commission adopted the decision and reached the conclusion that the proposed legislation could not be implemented because it was both regionally and materially selective:

a) It was found to be regionally selective, because despite being an autonomous region, Gibraltar was part of the European Union by virtue of its links with the United Kingdom and the reform conferred special advantages to companies in Gibraltar by taxing them more favourably than those in the rest of the United Kingdom.\textsuperscript{6}

b) It was found to be materially selective because first, there was a requirement to make a profit before incurring liability to payroll tax and BPOT, thus favouring companies which make no profit, secondly, the capping of tax at 15% of profits was favouring the companies that yield relatively small rates of profits as compared to their number of employees and the size of the business property and lastly, the payroll tax and the BPOT’s tax designs were more advantageous to offshore companies than to onshore companies.\textsuperscript{7}

The United Kingdom, in case T 215/04 and the Government of Gibraltar, in case T 211/04 each brought an action for annulment of the aforementioned decision.

\section*{III – Judgment of the General Court (former Court of First Instance)}
The applicants put forward three pleas in law which were as follows:

a) Errors of law and assessment regarding application of the criterion of regional selectivity

b) Errors of law and assessment regarding application of the criterion of material selectivity

c) Breach of the essential procedural requirements

\footnotesize{\textsuperscript{3} Joined Cases C-106/09 P and C-107/09 P European Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (CJEU, 15 November 2011) para 25.}

\footnotesize{\textsuperscript{4} ibid para 24.}

\footnotesize{\textsuperscript{5} ibid para 9.}

\footnotesize{\textsuperscript{6} ibid para 20.}

\footnotesize{\textsuperscript{7} ibid para 21.}
The General Court only examined the first two as it was not considered necessary to examine the third plea after having upheld the first two pleas. The Court decided as follows for the first two pleas:

a) **Regional Selectivity**: The General Court decided to annul the decision of the Commission by following the principles established in the CJEU’s judgment in Case C-88/03 Portugal v Commission. In the decision, the CJEU provided the three stage test to be satisfied in order not to be classed a regionally selective tax scheme: (i) the tax scheme has to be taken by a regional or local authority which has a political and administrative status separate from that of the central government, (ii) it must have been adopted without the central government being able to directly intervene as regards its content, and (iii) the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government. The General Court reached the conclusion that the three criteria were met; therefore the contested decision was vitiated by an error of law and of assessment.

b) **Material Selectivity**: The General Court identified three steps to be pursued to establish materially selective tax legislation. First, the Commission has to identify and examine the common or “normal” regime under the tax system applicable in the geographical area constituting the relevant reference framework. Next, it has to be determined whether any advantage granted by the tax measure at issue may be selective by showing that the measure derogates from that common or “normal” regime to the extent that the measure differentiates between economic operators who are in a comparable factual and legal situation. After establishing these two criteria, the Commission has to determine whether or not the measure in question is not selective in nature even though it gives an advantage to the undertakings which are able to benefit from it. The General Court decided to annul the decision of the Commission since the latter failed both to pursue the above procedures and failed to submit validly the derogation from the “normal” tax regime.

**IV – Issues on Appeal**

The Commission raised a single ground of appeal by which the General Court’s conclusions with regard to material selectivity of the proposed tax reform was contested. It did not touch upon the question on regional selectivity in the appeal phase. On the other hand, the Kingdom of Spain put forward 11 grounds of appeal, which may be divided into 3 groups, relating, first, to the regional selectivity of the
V – The Court of Justice of the European Union
The Court of Justice examined in detail only the arguments relating to material selectivity. The Court’s findings, as to the grounds shown by the Commission claiming material selectivity of the proposed tax reform, were as follows:

a) **The requirement to make a profit and the capping of tax:** The Court of Justice stated that the General Court had not committed an error in law in ruling that the requirement to make a profit and the capping of tax at 15% of profits did not confer selective advantages. The Court accepted that the requirement to make a profit would benefit unprofitable companies and the capping of tax would benefit those that have profits that are low in relation to the number of employees and occupation of business property. However, these effects are not targeted to certain undertakings or production of certain goods within the meaning of Article 87(1) EC (now Article 107/1 TFEU) but are merely the random consequence of the profitability of the undertaking in question during the period of assessment. Accordingly, the Court of Justice reached the conclusion that there had been no selective advantages in this context.  

b) **Advantages accruing to offshore companies:** The Court of Justice, however, found that the General Court’s reasoning as to the non-existence of selective advantages concerning offshore companies is vitiated by an error of law. The Court criticised the technique used by the General Court in its judgment and stated that it had been mistaken in analysing the tax scheme for offshore companies by reference to its causes or their aims instead of considering its effects. As a result, the General Court’s approach excluded from the outset any possibility that the fact that no tax liability is incurred by offshore companies may be classified as a ‘selective advantage’. Instead, the General Court should have considered that the effect of the existence of a selective advantage is mitigation of the charges which are normally included in the company’s budget and made its judgment accordingly. Apart from the technique, the Court of Justice found that the General Court was wrong in criticising the Commission for not demonstrating the existence of a selective advantage for offshore companies. Conversely, the Commission did demonstrate to the requisite legal standard in the contested decision that offshore companies would enjoy selective advantages. The Court highlighted the fact that the tax was only to be charged according to the number of employees and the size of the business premises. The absence of any other basis of assessment excludes from the outset any taxation of offshore companies, since they have no employees and also do not occupy business property. The Court emphasised that this consequence has not arisen by coincidence but an intentional choice made in tax design that would result inevitably in non-

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14 ibid paras 77-84.
taxation of offshore companies. As such, the Court concluded that offshore companies enjoy selective advantages in the proposed tax reform.\textsuperscript{15}

It was deemed futile by the Court of Justice to consider the question of whether the proposed tax reform was regionally selective or not since it already decided that the proposed tax reform was materially selective in that it conferred selective advantages on offshore companies. That finding is sufficient in itself to substantiate the operative part of the contested decision. Even if the arguments against the regional selectivity were successful, this would not change the result as it could not form grounds for even partial annulment of the contested decision.\textsuperscript{16}

Also, the UK claimed that the Commission had breached its right of defence by not providing proper opportunity to the UK to raise defences as to material selectivity for offshore companies during the formal investigation. The main reason for this was that the material selectivity issue for offshore companies had allegedly not arisen at the beginning of the investigation but had been invoked manifestly by an interested party later on, i.e. Spain and this claim was used in the Commission’s decision. The Court rejected the claim on the basis that the investigation’s scope had been sufficiently broad to cover the advantages pertaining to offshore companies and that the UK had had the opportunity to make known its views on the truth at any time against the allegations of the interested parties.\textsuperscript{17}

VI – Outcome of the Appeal
The Court of Justice quashed the judgment of the General Court of 18 December 2008 in the Joined Cases T-211/04 and T 215/04 Government of Gibraltar and United Kingdom v Commission by which the decision of the Commission had previously been annulled. Accordingly, the Commission’s decision on the proposed tax regime in Gibraltar is valid, wherefore the proposal shall not be implemented.

VII – Impact on Current Law
The judgment of the Court of Justice manifestly shows that it is not possible for an EU Member State to create in effect a favourable tax regime specifically for offshore companies despite the regime applying only to a considerably small and autonomous part of the State in question. Therefore, a flat tax rate of 10\% of profits per annum now applies to all companies in Gibraltar.\textsuperscript{18}

However, the most important and controversial aspect of the judgment is on the regional selectivity issue. Did the Court of Justice, by not examining the issue of regional selectivity in the case, implicitly approve the principles established in Case C-88/03 Portugal v Commission [2006] ECR I-7115 and did they therefore remain intact? The answer is ‘Yes’ according to William Hague, Foreign Secretary of the UK.

\begin{itemize}
\item \textsuperscript{15} ibid paras 85-100.
\item \textsuperscript{16} ibid para 186.
\item \textsuperscript{17} ibid paras. 155-182.
\item \textsuperscript{18} This change was made by enactment of the new Gibraltar Tax Act in 2010 and by repealing the Companies (Taxation and Concessions) Ordinance of 1967 which prescribed the beneficial regime for offshore companies.
\end{itemize}
United Kingdom.\textsuperscript{19} Interestingly, the Commission and the Kingdom of Spain shared a different approach given that they tried to deduce a fourth condition from the said case to support their position relating to the proposed tax reform of Gibraltar, i.e. “the infra-State body must occupy a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate.”\textsuperscript{20} In any case, it is hoped that the CJEU would examine the aforementioned issues at the next available opportunity and clarify the matter.

The real-world effect of this debate will most likely appear with respect to the referendum on Scotland’s future. If the majority of Scottish people vote for devolution-max which would entail devolution of tax competence from the central government to the local Scottish government and if the Scottish government determines a favourable tax regime in Scotland for companies, it may be deemed tantamount to State aid under Article 107 TFEU. The issue is likely to cause hot debates in the upcoming months.


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